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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

WASTE CONTRACTORS, INC., PETITIONER

v.

LAUDERDALE COUNTY COMMISSION AND
THE STATE OF ALABAMA, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

ANDREW J. PINCUS *
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 778-0628

H. THOMAS WELLS, JR.
JAMES L. PRIESTER
Maynard, Cooper,
Frierson & Gale, P.C.
1901 Sixth Avenue, North
2400 AmSouth/Harbert Plaza
Birmingham, Alabama 35203-2602
(205) 254-1000

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Petitioner Waste Contractors, Inc., obtained from the Lauderdale County Commission a license to construct and operate a sanitary landfill in Lauderdale County, Alabama. The Commission later revoked the license without providing Waste Contractors either prior notice or an opportunity to be heard. The Supreme Court of Alabama acknowledged that the revocation of the license violated Waste Contractors' federal due process rights, but refused to invalidate the Commission's action. The court held that the Commission's initial decision granting the license to Waste Contractors violated the due process rights of the "affected citizenry" of Lauderdale County—the persons living in the general area surrounding the proposed landfill site—and that this due process violation excused the subsequent violation of Waste Contractors' due process rights. The questions presented are:

1. Whether the protections of the Due Process Clause extend to persons who claim that they will be affected in some way by a government land use decision but have no ownership or other property interest in the land at issue.

2. Whether, assuming that the Commission did violate the due process rights of the "affected citizenry" when it awarded the landfill license to Waste Contractors, the Commission was for that reason free to revoke the license without providing Waste Contractors with prior notice and an opportunity to be heard.

RULE 29.1 STATEMENT

Petitioner Waste Contractors, Inc.'s parent corporation is Waste Management of North America, Inc.; the latter company's parent corporation is Waste Management, Inc. Waste Contractors, Inc. has no subsidiaries other than wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
RULE 29.1 STATEMENT	II
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
A. The Search For A Landfill Site	3
B. The Revocation Of The License	5
C. The Litigation	5
REASONS FOR GRANTING THE PETITION	7
I. THIS COURT SHOULD REVIEW THE ALABAMA SUPREME COURT'S DETERMINATION THAT THE "AFFECTED CITIZENRY" OF LAUDERDALE COUNTY WERE DEPRIVED OF THEIR PROPERTY IN VIOLATION OF THE FEDERAL DUE PROCESS CLAUSE	8
A. Persons Who Claim That They Will Be Affected By A Government Land Use Decision But Have No Property Interest Whatsoever In The Land At Issue Do Not Have An Interest Protected By The Due Process Clause	9
B. The Alabama Supreme Court's Erroneous Construction Of The Due Process Clause Conflicts With Decisions Of A Number Of Federal Courts Of Appeals And State Supreme Courts And The Question Is One Of Substantial Practical Importance	14

TABLE OF CONTENTS—Continued

Page

II. THE ALABAMA SUPREME COURT'S RULING THAT THE COMMISSION'S VIOLATION OF THE "AFFECTED CITIZENRY['S]" DUE PROCESS RIGHTS EXCUSED THE COUNTY COMMISSION'S SUBSEQUENT VIOLATION OF WCI'S DUE PROCESS RIGHTS ALSO PRESENTS AN IMPORTANT QUESTION WARRANTING THIS COURT'S ATTENTION 16

A. The County Commission Cannot Avoid The Consequences Of Its Violation Of WCI's Due Process Rights By Pointing To Its Previous Violation Of Other Parties' Constitutional Rights 17

B. The Correctness Of The Alabama Supreme Court's "Two-Wrongs-Defeat-A-Right" Approach To Due Process Analysis Should Be Reviewed By This Court 19

CONCLUSION 21

APPENDIX A 1a

APPENDIX B 12a

APPENDIX C 21a

APPENDIX D 26a

TABLE OF AUTHORITIES

Cases:

	Page
Ancarrow v. *City of Richmond*, 600 F.2d 443 (4th Cir.), cert. denied, 444 U.S. 992 (1979)	13
Armstrong v. *Manzo*, 380 U.S. 545 (1965)	7
BAM Historic Dist. Ass'n v. *Koch*, 723 F.2d 233 (2d Cir. 1983)	13, 15
Barry v. *Barchi*, 443 U.S. 55 (1979)	7
Bell v. *Burson*, 402 U.S. 535 (1971)	7
Board of Regents v. *Roth*, 408 U.S. 564 (1972)	8, 9, 11
Brock v. *Roadway Express, Inc.*, 481 U.S. 252 (1987)	8
Brown v. *Brienen*, 722 F.2d 360 (7th Cir. 1983)	14
City of Tuscaloosa v. *Bryan*, 505 So. 2d 330 (Ala. 1987)	10
City of West Chicago v. *United States Nuclear Regulatory Comm'n*, 701 F.2d 632 (7th Cir. 1983)	13
Cleveland Board of Education v. *Loudermill*, 470 U.S. 532 (1985)	9, 17
Codd v. *Velger*, 429 U.S. 624 (1977)	18
General Dynamics Corp. v. *City of Groton*, 184 Conn. 483, 440 A.2d 185 (1981)	15
Goldberg v. *Kelly*, 397 U.S. 254 (1970)	20
Goodrich v. *Detroit*, 184 U.S. 432 (1902)	15
Gray v. *Mississippi*, 481 U.S. 648 (1987)	18
Hancock v. *City of Muskogee*, 250 U.S. 454 (1919)	15
In re Great Waters of America, 140 Vt. 105, 435 A.2d 956 (1981)	15
Izaak Walton League of America v. *Marsh*, 655 F.2d 346 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981)	13, 15
Kerley Industries, Inc. v. *Pima County*, 785 F.2d 1444 (9th Cir. 1986)	19-20
Leis v. *Flynt*, 439 U.S. 438 (1979)	9, 11
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982)	11
Lynwood Property Owners Ass'n v. *Lands Described*, 359 So. 2d 357 (Ala. 1978)	10
Masters v. *Pruce*, 290 Ala. 56, 274 So. 2d 33 (1973)	10

TABLE OF AUTHORITIES—Continued

	Page
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	9
Mehta v. *Surles*, No. 89-7965 (2d Cir. May 29, 1990)	13
Morrissey v. *Brewer*, 408 U.S. 471 (1972)	20
Mosher v. *City of Boulder*, 225 F. Supp. 32 (D. Colo. 1964)	14, 15
Noble v. *Union River Logging R.R.*, 147 U.S. 165 (1893)	7
O'Bannon v. *Town Court Nursing Center*, 447 U.S. 773 (1980)	11, 12
Olim v. *Wakinekona*, 461 U.S. 238 (1983)	14
Paul v. *Davis*, 424 U.S. 693 (1976)	10, 12, 13
Peralta v. *Heights Medical Center, Inc.*, 485 U.S. 80 (1988)	7
Perry v. *Sindermann*, 408 U.S. 593 (1972)	9
Reichelderfer v. *Quinn*, 287 U.S. 315 (1932)	13
St. Louis & Southwestern Ry. v. *Nattin*, 277 U.S. 157 (1928)	15
Save Our Dunes v. *Alabama Dep't of Environmental Management*, 834 F.2d 984 (11th Cir. 1987)	14-15
Simons v. *Gorsuch*, 715 F.2d 1248 (7th Cir. 1983)	15
York v. *City of Cedartown*, 648 F.2d 231 (5th Cir. Unit B 1981)	13, 14

Constitution and Statutes:

United States Constitution Amend. XIV	*passim*
Ala. Code § 22-27-5(b)	3

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LAUDERDALE COUNTY COMMISSION AND THE STATE OF ALABAMA, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Waste Contractors, Inc., respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra*, 1a-11a) is not yet reported. The opinion of the Court of Civil Appeals of Alabama (App., *infra*, 12a-20a) and the orders of the Lauderdale County Circuit Court granting summary judgment to the Lauderdale County Commission (App., *infra*, 21a-25a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on February 16, 1990, and a petition for rehearing was denied on April 6, 1990 (App., *infra*, 26a-

27a). On June 22, 1990, Justice Kennedy issued an order extending the time for filing the petition for a writ of certiorari to and including August 6, 1990. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

This case arises out of the efforts of Waste Contractors, Inc. ("WCI"), to establish a sanitary landfill for non-hazardous solid waste in northern Lauderdale County, Alabama. After spending four years and approximately $80,000 locating and developing an appropriate site in conjunction with the Lauderdale County Commission, WCI in April 1987 received the Commission's unanimous approval to construct and operate the landfill. Just two months later, however, the Commission abruptly reversed itself and revoked WCI's license. Prior to the revocation of the license, WCI received no notice, constructive or otherwise, that the Commission was considering such action, and WCI was never given an opportunity to be heard in defense of its landfill license. WCI has never been informed of the reasons for the revocation of its license.

The Alabama Supreme Court recognized that the Lauderdale County Commission's revocation of the permit deprived WCI of its property without due process of law, but nonetheless refused to provide redress of any kind, reasoning that the citizens "affected" by the landfill had been entitled to process before the initial licensing and that the two due process violations cancelled each other out. That determination is fundamentally inconsistent with this Court's due process jurisprudence in two

important respects. First, it dramatically expands the class of government actions subject to due process requirements. Second, it drastically impairs the constitutional protection now extended to persons who hold government licenses by allowing government to revoke such licenses without according the licenseholders notice and an opportunity to be heard.

A. The Search For A Landfill Site

The search for a new landfill site in Lauderdale County began in 1985. By that time, it had become apparent that the County's existing facilities for the disposal of waste would soon be full; prudent local planning dictated that arrangements be made for a new facility. To that end, Waste Contractors, together with the Lauderdale County Commission—the County's governing body, which is authorized to license landfill operations (see Ala. Code § 22-27-5(b))—began to research and evaluate potential sites. R. 102-103.

The first site selected, the 200 acre Prides Ferry Site, was proposed in June 1985. After consulting with WCI and visiting the site themselves, the Lauderdale County Commissioners unanimously approved the site; WCI began environmental testing and applied for a permit from the Alabama Department of Environmental Management ("ADEM"). R. 107; see also R. 103. WCI spent over $26,000 evaluating and testing the site, purchasing options on the land, and applying for state permits. R. 119. However, environmental research revealed that use of the site would threaten two endangered species of wildlife indigenous to Alabama: the blind Alabama cave fish and the gray bat. WCI accordingly withdrew its permit application voluntarily and began seeking other landfill sites. R. 103.

Over the course of the next two years, WCI and the Commission considered several other sites. In each case, the Commission and WCI worked together to evaluate

the suitability of the site. WCI spent several thousand dollars on each site, commissioning necessary environmental studies and conducting preliminary inspections. But, for reasons ranging from the need to protect another endangered species—the snail darter—to population density to problems with the land or soil, these sites were found to be unsuitable. R. 103, 119-120.

Finally, in early 1987, WCI and the Commission located a seemingly ideal location. The Greenbrier Site, as it is called, is situated on 115 acres of land in a sparsely populated area of Lauderdale County; indeed, the Lauderdale County Commission had itself considered purchasing the site for a county operated landfill. WCI and the County Commission discussed and visited the site several times during March and April of 1987. R. 103-104.

The Lauderdale County Commission unanimously granted WCI a landfill license for the Greenbrier Site on April 14, 1987. R. 82. One month later, the Commission again unanimously approved a proposal to add 125 adjoining acres to the site. R. 87. Under the terms of the operating license granted to Waste Contractors, the company was authorized to establish the site and operate it indefinitely, provided that it complied with all state regulations, disposed of no toxic waste in the facility, and paid Lauderdale County a fee of 1% of gross revenues or $20,000, whichever was greater. R. 82, 87.

Waste Contractors immediately began the various archeological and environmental surveys required for state approval of the site. In addition to the nearly $20,000 it had spent prior to final approval by the County Commission, WCI spent roughly another $20,000 in the two months following approval. Including the costs of options on the land and employee time and travel devoted to the project, WCI expended approximately $49,000 developing the Greenbrier Site prior to June 22, 1987. R. 120-121.

B. The Revocation Of The License

On June 22, 1987, the Lauderdale County Commission abruptly reversed itself, disapproving the Greenbrier Site and withdrawing WCI's permit to operate the landfill. R. 89. WCI had received no notice that the Greenbrier Site would be discussed by the Commission and had been given no other opportunity to be heard on the subject. The Greenbrier Site did not appear on the Commission's agenda for that date. R. 104. The Commission's minutes reveal only that "[w]ith a large delegation of citizens from the Zip City area present"—Zip City is a small community located near the Greenbrier Site—the Commission decided to revoke WCI's license "[w]ithout any discussion." R. 89. The Commission did not set forth any reasons for its decision to revoke WCI's license.

C. The Litigation

Following the Lauderdale County Commission's revocation of its license to operate the Greenbrier landfill, WCI promptly commenced this action in the Circuit Court of Lauderdale County, alleging that the Commission's decision violated state and federal law. R. 1-13. Count Two of the complaint specifically alleged that the revocation of the license deprived WCI of its property without due process of law because WCI was not afforded prior notice and an opportunity to be heard. R. 7.

An organization of Zip City residents calling themselves Lauderdale Citizens for a Clean Environment ("LCCE") attempted to intervene in this action. LCCE stated that it opposed construction of the landfill on the ground that the landfill would adversely affect the value of their land, the quality of the environment, and the hunting and other recreational uses of the area surrounding the landfill site. R. 23-37.[1] One of LCCE's legal ar-

[1] LCCE, together with a number of individuals, asserted 14 "factors" establishing their interest in the case (R. 23-24):

1. Their interest in the quiet enjoyment of their private property. 2. Their interest in the value of their property. 3. Their

guments was that its members had been deprived of their due process rights by the decision granting the landfill license to WCI. R. 44. The circuit court never ruled on LCCE's motion to intervene.

The circuit court granted summary judgment in favor of the Commission. App., *infra*, 21a-23a. It found that the Commission had acted within its legal authority in revoking WCI's license, reasoning that the Commission must be entitled to rescind licenses summarily in order to maintain flexibility to respond to new information. *Id.* at 22a.

Waste Contractors appealed and the Alabama Court of Civil Appeals reversed, holding that the Lauderdale County Commission had deprived WCI of its procedural due process rights because the Commission had not provided it with notice and an opportunity to be heard. The court found that there had been "a total failure of notice" and that there had "obviously [been] no hearing" and concluded that "the county commission was, therefore,

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interest in passing on this property to their heirs. 4. Their interests in preserving and protecting the aesthetic quality of their environment. 5. Their interest in enjoying, observing and hunting wildlife. 6. Their interest in the enjoyment of outdoor recreational resources. 7. Their interest in preventing the loss of use and value of their recreational resources. 8. Their interest in protecting themselves from breathing polluted air and drinking polluted water. 9. Their interest in preventing the nuisance of foul odors emanating from the proposed landfill. 10. Their interest in the use of well water from under the ground in the vicinity. 11. Their interest in preventing the pollution, contamination and destruction of their natural resources and natural well water supply. 12. Their interest in preventing irreparable harm to the environment. 13. Their interest in the maintenance of their own health, safety and welfare in their homes, family and community. 14. Their interests, generally, in protecting their best interests as private property owners and the best interests of their families.

without authority to take the action it did." App., *infra*, 18a.

The Supreme Court of Alabama reversed the decision of the Court of Civil Appeals. App., *infra*, 1a-11a. Although it began its discussion of the due process issue by noting that "[w]e agree with the Court of Civil Appeals in its conclusion that WCI's due process rights were violated," the Supreme Court of Alabama nonetheless refused to provide any relief. *Id.* at 9a. The court stated that "the affected citizenry" had a due process right to notice and an opportunity to be heard in the initial proceeding in which WCI received its license to operate the Greenbrier Site; the court concluded that the two procedural due process violations cancelled each other out: "If WCI's due process rights were violated by the subsequent revocation of the license without a hearing, then certainly the due process rights of the affected citizenry were violated when the license was first issued without a hearing." *Id.* at 8a.[2]

REASONS FOR GRANTING THE PETITION

The Alabama Supreme Court recognized, as it had to, that the Lauderdale County Commission's revocation of the landfill license without any prior notice violated WCI's due process rights. App., *infra*, 9a. See, *e.g.*, *Barry* v. *Barchi*, 443 U.S. 55, 64 & n.11 (1979) (revocation of horse trainer license must accord with due process); *Bell* v. *Burson*, 402 U.S. 535 (1971) (driver's license); *Noble* v. *Union River Logging R.R.*, 147 U.S. 165 (1893) (right of way over public land). Incredibly, however, the court refused to provide a remedy to "wipe[] the slate clean," as the Due Process Clause requires. *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); see also *Peralta* v. *Heights Medical Center, Inc.*, 485 U.S. 80, 86-87 (1988).

[2] The Alabama Supreme Court also determined that the Commission's action was proper under state law. App., *infra*, 1a-11a.

The sleight-of-hand by which the Alabama court refused to overturn a license revocation that concededly violated due process rests on two separate propositions. First, that the Zip City residents were deprived of a property interest protected by the Due Process Clause when the Commission granted the landfill license to WCI. Second, that two due process violations may cancel each other out, relieving a government entity of an otherwise-existing obligation to afford due process to a person deprived of liberty or property. Each of these determinations is plainly wrong; each conflicts with decisions of other state and federal courts; and each addresses an issue of considerable practical importance. The Alabama Supreme Court's flawed due process analysis should be reviewed by this Court.

I. THIS COURT SHOULD REVIEW THE ALABAMA SUPREME COURT'S DETERMINATION THAT THE "AFFECTED CITIZENRY" OF LAUDERDALE COUNTY WERE DEPRIVED OF THEIR PROPERTY IN VIOLATION OF THE FEDERAL DUE PROCESS CLAUSE

It is settled law that procedural due process rights attach only when government action threatens to deprive an individual of a liberty or property interest protected by the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *Brock* v. *Roadway Express, Inc.*, 481 U.S. 252, 260 (1987); *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578 (1972). The Alabama Supreme Court here concluded that the decision approving the landfill site deprived the "affected citizenry" of a property right protected by the Due Process Clause. That determination is squarely inconsistent with this Court's decisions defining the reach of the Due Process Clause. Indeed, every court that has considered the precise question presented in this case—other than the Alabama Supreme Court—has concluded that citizens have no due process rights in connection with land use decisions concerning property owned by third parties. And, in view of the large num-

ber of land use decisions made by state and local government, the Alabama court's ruling that owners of adjacent land do have an interest protected by the Due Process Clause will have substantial real world consequences.

A. Persons Who Claim That They Will Be Affected By A Government Land Use Decision But Have No Property Interest Whatsoever In The Land At Issue Do Not Have An Interest Protected By The Due Process Clause.

Procedural due process analysis involves a well-established two step inquiry: first, a court must determine whether the state action complained of adversely impacts a life, liberty, or property interest cognizable under the Fourteenth Amendment; second, if a protected interest is at stake, a court must decide what procedural safeguards are constitutionally required in order to balance the needs of economy and justice. See, *e.g.*, *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 538-542 (1985); *Mathews* v. *Eldridge*, 424 U.S. 319, 332-333 (1976).

It is axiomatic that "the range of interests protected by procedural due process is not infinite." *Roth*, 408 U.S. at 570. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. That claim of entitlement must be grounded in an independent source of law, such as a "statute or legal rule or * * * a mutually explicit understanding." *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979) (per curiam). Interests lacking a foundation in positive law or amounting to only a "mere subjective 'expectancy'" are not protected by the Due Process Clause. *Perry* v. *Sindermann*, 408 U.S. 593, 603 (1972).

In ruling that Zip City residents living near the Greenbrier Site had a constitutional right to be heard before

the Lauderdale County Commission could issue a landfill license to WCI, the Alabama Supreme Court concluded that a landowner's interest in the use of his neighbor's property is sufficiently concrete to be protected by due process. The court observed that "[p]rocedural due process is not properly afforded when one's life, liberty, or property interests are affected without prior notice and an opportunity for a hearing" (App., *infra*, 8a) and stated that "the original license should not have been issued without notice and an opportunity for a hearing," labeling that failure a "violat[ion]" of the "due process rights of the affected citizenry." *Id.* at 8a-9a.[3]

That determination is plainly wrong. Third parties enjoy no general constitutional right to due process in connection with land use decisions concerning only the property owned by others. The sorts of aesthetic, economic, environmental, and recreational interests that may be asserted by a third party to a government land use determination—and that were asserted by the Zip City residents in this case (see pages 5-6 & note 1, *supra*)—are insufficient as a matter of law to trigger the protection of the Due Process Clause.

The starting point in determining whether an individual has a constitutionally protected liberty or property interest is whether the asserted interest is grounded in an independent source such as state law. But not every interest grounded in state law is protected by the Due Process Clause. See, *e.g.*, *Paul* v. *Davis*, 424 U.S. 693, 710-712 (1976). Rather, this Court has identified several criteria that must be applied to ascertain whether an interest with some basis in state law rises to the level

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[3] Significantly, the same conclusion is apparent in several other decisions of the Alabama Supreme Court. See *City of Tuscaloosa* v. *Bryan*, 505 So. 2d 330 (Ala. 1987); *Lynwood Property Owners Ass'n* v. *Lands Described*, 359 So. 2d 357 (Ala. 1978); *Masters* v. *Pruce*, 209 Ala. 56, 274 So. 2d 33 (1973).

of a property interest protected by the Due Process Clause.

First, a court must assess the concreteness of the asserted interest; in other words, is the entitlement firmly defined by state law? See *Leis*, 439 U.S. at 441-443; *Roth*, 408 U.S. at 577-578. The more closely an interest resembles a right of ownership or a right defined by contract, the more likely compliance with due process will be required before the government may take it away. If, on the other hand, state law holds that the nature and scope of the asserted interest turns on the exercise of unguided discretion, the interest is not likely to be sufficiently concrete to give rise to a constitutionally protected entitlement. "The hallmark of property * * * is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

A second consideration is whether the challenged government action directly threatens the asserted interest. In *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), this Court ruled that the interests of nursing home residents in continued residence at the home did not entitle them to invoke the Due Process Clause to challenge the revocation of the home's operating authority. The Court explained that its refusal to recognize procedural due process rights rested on "[t]he simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally." *Id.* at 788. Where the alleged harm stems from government action directed against a third party, the interest will not suffice to invoke the Due Process Clause because that provision of the Constitution "does not apply to the indirect adverse effects of governmental action." *Id.* at 789. This is true even if the government action against

the third party may create "serious inconvenience or harm." *Id.* at 788.

Finally, an interest indirectly impaired by government is especially unlikely to receive due process protection when it is premised on a traditional tort right. Where a damages remedy is available against the person who is the direct cause of the harm complained of, courts are reluctant to subject government to the requirements of due process on the theory that it is the remote cause of the damage. Thus, in *O'Bannon* the Court suggested that the nursing home residents might have a damages claim against the home and implied that it would be cumbersome and inefficient to permit these residents to "interject themselves," as a matter of constitutional right, into the dispute between the home and the government that only indirectly affected them. *O'Bannon*, 447 U.S. at 787, 788; see also *Paul* v. *Davis*, 424 U.S. at 711-712.

The flaw in the Alabama Supreme Court's determination is easily demonstrated when the foregoing criteria are applied to the interests in the landfill licensing asserted by the Zip City residents when they attempted to intervene in this litigation. See pages 5-6 & note 1, *supra*. These interests fall into four general categories. The first is economic, encompassing the Zip City residents' interest in the value of their property and in their right to bequeath it to their heirs. The second category is aesthetic—an interest in "preserving and protecting the aesthetic quality of their environment." The third group is recreational, including interests in enjoying and hunting local wildlife and experiencing outdoor recreational resources. The fourth, and most numerous, category of interests is environmental; this essentially includes the interests conventionally protected by nuisance law, including the right to quiet enjoyment of one's property, an interest in avoiding pollution and foul odors, and a general concern for environmental quality. None of these interests is adequate under the Fourteenth Amendment

to trigger procedural protections; indeed, the Alabama court's discord with other courts on this point is stark.

To begin with, the generalized aesthetic and recreational interests lack a sufficiently firm foundation in state law to rise to the level of legitimate claims of entitlement protected by the Due Process Clause. See *City of West Chicago* v. *United States Nuclear Regulatory Comm'n*, 701 F.2d 632, 645 (7th Cir. 1983); *Izaak Walton League of America* v. *Marsh*, 655 F.2d 346, 361 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981). "[Alabama] law does not extend to [neighboring landowners] any legal *guarantee* of present enjoyment [of these interests] which has been altered" by the challenged government action. *Paul* v. *Davis*, 424 U.S. at 711 (emphasis added).

The Zip City residents' interests in the value of their property, although more substantial than their generalized aesthetic and recreational interests, are nonetheless inadequate to call the Due Process Clause into play. Because these interests could only be impaired *indirectly* as a result of the licensing of the landfill, and because the residents' right to sue the landfill operator for a private nuisance would be preserved, fears of diminished property values fall far short of establishing a property interest. "A person cannot claim a constitutionally-protected property interest in uses of neighboring property on the ground that these uses may affect the market value of his own property." *Mehta* v. *Surles*, No. 89-7965, slip op. at 4174 (2d Cir. May 29, 1990) (per curiam); accord *Reichelderfer* v. *Quinn*, 287 U.S. 315 (1932); *BAM Historic Dist. Ass'n* v. *Koch*, 723 F.2d 233, 237 (2d Cir. 1983); *York* v. *City of Cedartown*, 648 F.2d 231, 232 (5th Cir. Unit B 1981); *Ancarrow* v. *City of Richmond*, 600 F.2d 443, 447 (4th Cir.), cert. denied, 444 U.S. 992 (1979).

Finally, the neighboring landowners' rights to quiet enjoyment of their property lack the firm grounding in state law needed to trigger Fourteenth Amendment pro-

tection. Because a nuisance action to vindicate those rights involves a sensitive and unpredictable balancing of interests, the rights themselves are vague and indeterminate. "The tort rights that nuisance law gives a landowner against a polluter do not have the solidity of common law property rights, and the interest they protect is not property under the Fourteenth Amendment." *Brown* v. *Brienen*, 722 F.2d 360, 364 (7th Cir. 1983); accord *York*, 648 F.2d at 232; *Mosher* v. *City of Boulder*, 225 F. Supp. 32 (D. Colo. 1964).

In sum, the court below plainly erred in concluding that the approval of the landfill site deprived the area residents of their property within the meaning of the federal Due Process Clause.[4]

B. The Alabama Supreme Court's Erroneous Construction Of The Due Process Clause Conflicts With Decisions Of A Number Of Federal Courts Of Appeals And State Supreme Courts And The Question Is One Of Substantial Practical Importance.

The question whether persons who are third parties to a land use determination have a property interest protected by the Due Process Clause has been addressed by a large number of federal and state courts. Every court to consider the question, other than the Alabama Supreme Court, has concluded that such persons do not have a property interest protected by the Due Process Clause. See *Save Our Dunes* v. *Alabama Dep't of Environmental Management*, 834 F.2d 984, 988-989 (11th Cir. 1987) (no

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[4] This case concerns only the question whether the federal Constitution itself *requires* that state and local governments afford procedural rights to neighboring landowners in situations like this one. A state may by statute choose to grant neighboring landowners procedural rights in connection with land use decisionmaking. Of course, such procedural rights would rest entirely on state law and would not trigger application of the federal due process guarantee. *Olim* v. *Wakinekona*, 461 U.S. 238, 250-251 (1983).

due process required for citizens and environmentalists objecting to development on coastal beach they claimed to use); *BAM Historic Dist. Ass'n*, 723 F.2d at 237 (no due process required for landowners in vicinity of proposed homeless shelter); *Simons* v. *Gorsuch*, 715 F.2d 1248, 1252 n.6 (7th Cir. 1983) (no due process required for landowners located near proposed sewage treatment facility); *Izaak Walton League*, 655 F.2d at 361 (no due process required for railroads and environmentalists harmed by plan to alter river locks and dam, although public meeting is required by regulation); *Mosher*, 225 F. Supp. at 32-33 (dismissing complaint, for lack of a federal question, that city's maintenance of a dump emitting noxious odors, gas, debris, and tongues of flame violated due process and constituted a taking); *General Dynamics Corp.* v. *City of Groton*, 184 Conn. 483, 440 A.2d 185 (1981) (no due process required for landowners abutting street, a portion of which will be closed); *In re Great Waters of America*, 140 Vt. 105, 435 A.2d 956 (1981) (no due process required for adjoining landowner prior to granting construction permit for factory); see also *St. Louis & Southwestern Ry.* v. *Nattin*, 277 U.S. 157 (1928) (no due process required for landowners whose property will be included in a local road district); *Hancock* v. *City of Muskogee*, 250 U.S. 454 (1919) (no due process required for landowners whose property will be included in a sewer district); *Goodrich* v. *Detroit*, 184 U.S. 432 (1902) (no due process required for landowners whose property may be assessed to finance road improvements). This Court should grant the certiorari petition to resolve this conflict among the lower courts.

Moreover, this question is one of substantial practical importance. State and local governments make innumerable land use decisions each year. Under the Alabama Supreme Court's rationale, the "affected citizenry" would have to be afforded due process protections with respect to each of these decisions.

The Alabama Supreme Court has effectively required governmental entities in the State to inform all potentially interested landowners prior to making any land use decision, no matter how trivial, in order to protect the decision against subsequent due process attack. State law rules regarding appropriate procedures for land use determinations—which reflect a balance between appropriate community consultation and the need for efficient decisionmaking—will be supplanted by rules grounded in the federal Constitution and formulated by judges rather than the communities themselves. This Court should consider whether the Due Process Clause mandates that intrusive result.

II. THE ALABAMA SUPREME COURT'S RULING THAT THE COMMISSION'S VIOLATION OF THE "AFFECTED CITIZENRY['S]" DUE PROCESS RIGHTS EXCUSED THE COUNTY COMMISSION'S SUBSEQUENT VIOLATION OF WCI'S DUE PROCESS RIGHTS ALSO PRESENTS AN IMPORTANT QUESTION WARRANTING THIS COURT'S ATTENTION

Even if, contrary to our position, the Commission's decision granting the license to WCI did deprive area residents of a property interest, the Alabama Supreme Court nonetheless erred by concluding that the Commission's violation of these residents' due process rights somehow excused the subsequent violation of WCI's due process rights. In this context, two wrongs most assuredly cannot defeat WCI's right. The Alabama court's conclusion that a prior violation of the Due Process Clause could serve as a valid predicate for subsequently denying WCI due process of law conflicts with this Court's precedents and a decision of a federal court of appeals and threatens to introduce substantial uncertainty and confusion into this Court's due process jurisprudence.

A. The County Commission Cannot Avoid The Consequences Of Its Violation Of WCI's Due Process Rights By Pointing To Its Previous Violation Of Other Parties' Constitutiona' Rights.

Due process protections attach whenever government action threatens to deprive a person of a property right. While the method by which the person initially acquired the property right may be relevant to the government's power to deprive him of that right, it is wholly irrelevant to the question whether the individual is entitled to due process with respect to the revocation decision. Due process at a minimum requires that a person threatened with deprivation of property by a government entity, for whatever reason, receive notice and an opportunity to be heard.

That is what this Court held in *Cleveland Board of Education* v. *Loudermill*, *supra*, a case involving the discharge of a security guard for lying on his employment form. The Board of Education argued that because the guard acquired his job in violation of the governing employment standard he "lacked a 'legitimate claim of entitlement' to the position." 470 U.S. at 539 n.5. This Court rejected that argument because it relied on "a retrospective fiction inconsistent with the undisputed fact that [the individual] was hired and did hold the security guard job. The Board cannot escape its constitutional obligations by rephrasing the basis for termination as a reason why [the individual] should not have been hired in the first place." *Ibid.*

Here, the Alabama Supreme Court could not escape its obligation to vacate the revocation of WCI's license by invoking the fiction that the license was not validly obtained in the first place because the rights of the "affected citizenry" were violated. Regardless of how the property was obtained, WCI may not be deprived of it without due process of law.

The Alabama Supreme Court's contrary approach is especially misplaced in this context because it penalizes an entirely innocent private party—WCI—for the County Commission's earlier transgression of the constitutional rights of entirely separate parties. Nothing in this Court's due process jurisprudence authorizes such an absurd result.

In *Gray* v. *Mississippi*, 481 U.S. 648 (1987), this Court addressed an argument similar to the one adopted by the Alabama Supreme Court. The Mississippi Supreme Court in *Gray* had sought to justify the unlawful exclusion of a citizen from a capital jury on the grounds that the judge involved had earlier admitted several citizens to the jury who should have been excluded. This Court rejected that argument unequivocally. "Our reasons are embraced by that well-worn adage that 'two wrongs do not make a right.' * * * [W]e cannot condone the 'correction' of one error by the commitment of another." *Id.* at 663. The same conclusion applies here.

Finally, the Alabama Supreme Court's decision cannot be justified on the ground that a revocation hearing would not serve any useful purpose. Compare *Codd* v. *Velger*, 429 U.S. 624, 627-628 (1977) (hearing not required where party asserting deprivation of liberty and property did not identify the disputed issue that would be the subject of the hearing). A hearing in this case would serve the essential purpose of enabling the County Commission to exercise informed discretion in determining the effect of any due process violation on the validity of WCI's license.

We have discovered nothing in Alabama law that *requires* the Commission to revoke a license found to have been awarded in violation of a third party's due process rights. The County Commission must hold a hearing so that it may make an informed judgment whether revocation is warranted on the facts of this case. For example,

assuming that the due process rights of third parties were violated by the decision granting the permit, the Commission could decline to revoke WCI's license on the ground that those third parties should have sought to vindicate their rights by seeking judicial review of the decision granting the permit.

Alternatively, the Commission might give interested third parties an opportunity to present their objections at the revocation hearing and then decide—after taking into account those views and WCI's responses—whether WCI is entitled to retain its license under the governing statutory standards. The question of the effect of any due process violation on the validity of WCI's license is thus uncertain; the issue must be addressed in the first instance by the County Commission after WCI is given prior notice and an opportunity to comment.

B. The Correctness Of The Alabama Supreme Court's "Two-Wrongs-Defeat-A-Right" Approach To Due Process Analysis Should Be Reviewed By This Court.

The rule applied by the Alabama Supreme Court in this case conflicts with a recent decision of the United States Court of Appeals for the Ninth Circuit. In *Kerley Industries, Inc.* v. *Pima County*, 785 F.2d 1444 (9th Cir. 1986), Kerley Industries had received a conditional permit allowing it to operate a chemical plant for 30 days. Prior to the beginning of the 30-day period, a county official informed Kerley that the conditional permit had been terminated on the ground that it was improperly issued and therefore "null and void." Kerley brought suit, claiming that it had a property interest in the permit and was entitled to notice and an opportunity to be heard prior to the termination of the permit.

The court of appeals held in favor of Kerley. "Having granted [Kerley] a permit to operate its plant, the county could not take it away arbitrarily, for improper reasons,

or without appropriate procedural safeguards. *The fact that [Kerley's] operation might have violated the county's zoning ordinance does not render its interest in the permit any less deserving of constitutional protection. * * * The permit could not be revoked without giving Kerley an opportunity to prove the [county official] wrong.*" 785 F.2d at 1446 (emphasis added; citations omitted). The Ninth Circuit has thus squarely rejected the very principle adopted by the Alabama Supreme Court here—that a legal error in the decision granting a property interest allows government to revoke that property interest without affording any procedural protections to the property owner.

Moreover, the rule adopted by the Alabama Supreme Court will have significant practical consequences. Under the Alabama court's rule, a property owner can never rely on a property interest granted by the government because any such interest might someday be subject to summary revocation on the ground that it allegedly was granted in violation of law. And the Alabama rule allows a government body to bootstrap its way into dealing arbitrarily with the citizenry: if a County Commission wants to be able to dispense with a hearing and revoke a license at will, it need only violate some legal rule when it grants the license in the first place.

Finally, the Alabama Supreme Court's approach may have repercussions far outside the land use context. For example, if governmental error in an initial grant of property could allow a subsequent revocation of that property without affording due process, then a welfare recipient incorrectly added to the rolls could have his or her benefits summarily cut off, or a paroled prisoner whose parole board had erred could be reincarcerated without a hearing. Yet this Court has held that notice and an opportunity to be heard are required before these actions may be taken. See *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). This

Court should review the decision below to eliminate the "loophole" in the Due Process Clause created by the Alabama Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW J. PINCUS *
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 778-0628

H. THOMAS WELLS, JR.
JAMES L. PRIESTER
Maynard, Cooper,
Frierson & Gale, P.C.
1901 Sixth Avenue, North
2400 AmSouth/Harbert Plaza
Birmingham, Alabama 35203-2602
(205) 254-1000

* *Counsel of Record*

August 6, 1990

APPENDICES

APPENDIX A

THE STATE OF ALABAMA—
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1989-90

88-557

EX PARTE: LAUDERDALE COUNTY

88-583

EX PARTE: STATE OF ALABAMA

Petitions for Writ of Certiorari to
the Court of Civil Appeals

RE: WASTE CONTRACTORS, INC.

v.

STATE OF ALABAMA, LAUDERDALE COUNTY
(Lauderdale Circuit Court, CV-87-460)

[Released Feb. 16, 1990]

KENNEDY, JUSTICE.

The defendants, Lauderdale County ("County") and the State of Alabama ("State"), seek review of the Court of Civil Appeals' judgment reversing a summary judgment entered by the trial court in favor of the County and the State. We reverse and remand.

On April 14, 1987, the Lauderdale County Commission ("Commission") authorized Waste Contractors, Inc.

("WCI"), to operate a solid waste landfill near Zip City in northern Lauderdale County (hereinafter referred to as the "Greenbrier site").

On that date, without conducting a hearing, the Commission adopted the following resolution:

> "THEREFORE BE IT RESOLVED that the Lauderdale County Commission does hereby grant Waste Contractors permission to establish and operate a landfill in Lauderdale County provided:
>
> "1) all rules and regulations as promulgated by the State Health Department, State of Alabama, have been met in the establishment of and in the operation of said landfill,
>
> "2) no toxic waste will be disposed of in the proposed sanitary landfill located in Lauderdale County, and
>
> "3) Waste Contractors will pay to Lauderdale County a fee equal to 1% of gross revenue generated by the operation of this landfill, with a minimum of $20,000 annually, for the purpose of helping defray cost of maintaining county roads.
>
> "BE IT FURTHER RESOLVED that this authorization given Waste Management to establish a sanitary landfill is confined to the location as described in metes and bounds attached to this resolution and made a part of this resolution."

WCI subsequently filed a request to expand the size of the landfill, which was granted by a resolution of the Commission on May 11, 1987, again with a hearing.

On June 22, 1987, the Commission without a hearing, recinded both resolutions.

In July 1987, WCI, pursuant to § 22-27-5(b), *Code of Alabama* 1975, filed a formal permit application with the

Alabama Department of Environmental Management ("ADEM").

On August 10, 1987, the Commission adopted "License Requirements for Sanitary Landfills," intended to apply to landfills not yet in operation.

WCI filed suit against Lauderdale County on August 21, 1987, alleging that the Commission was powerless to rescind its original approval, that WCI's rights to due process were violated, and, by subsequent amendment to the suit, that § 22-27-5(b) was unconstitutional because of a failure to provide specific guidelines or standards for the Commission to follow in determining whether a landfill request should be granted.

At the hearing on its motion for summary judgment, the trial court ruled in favor of the defendants. The Court of Civil Appeals reversed and remanded. We have granted the writ of certiorari to review that reversal.

The issues here are whether the Solid Wastes Disposal Act, Code 1975, § 22-27-1 et seq., is unconstitutionally vague and capricious because of a failure to establish specific guidelines and criteria for county or local governments to follow in the issuance of waste permits; whether the Commission violated WCI's due process rights in failing to hold hearings on WCI's applications; whether the Commission had the authority to approve or disapprove WCI's application; and whether the Commission exceeded the authority granted to it by statute when it established licensing requirements for sanitary landfills.

The Solid Wastes Disposal Act ("Act"), Code 1975, § 22-27-1 et seq., permits county and municipal governments, with the concurrence of the health department and the approval of ADEM, to make available to the public collection and disposal facilities for solid wastes. It authorizes those governmental entities, either directly or through contract with private agencies, to collect and

dispose of solid wastes, subject to approval by ADEM and the state and or county boards of health.

The Act provides that if a governmental entity undertakes the responsibility of providing disposal services to the general public and does so by contracts and mutual agreements for disposal of solid wastes then those agreements are reviewable by the affected state or county health officer and subject to cancellation upon 30 days' notice from that officer, with the concurrence of ADEM, if the contracts or agreements are found not to be in the best interests of the health, safety, and welfare of the affected citizenry.

The Act *does* authorize governing bodies to assign territories and to approve or disapprove disposal sites.

Thus, under the Act, the process for establishing solid waste collection and disposal sites begins with the county or local governmental entity having control over the affected area. That entity is authorized to approve or disapprove sites with the concurrence of the appropriate health department and ADEM. Therefore, before a private corporation, individual, or governing body can establish a site under the Act, it must first have the approval of the local government, and then the approval of both the health department and ADEM.

The Court of Civil Appeals held the Act to be unconstitutional, writing:

> "[Because] the grant of power to local governing bodies to approve or disapprove sites that presently exists in § 22-27-5(b)[1] is totally devoid of standards

[1] Section (b) of the Act reads as follows:

"(b) Private or corporate agencies.—Individuals, corporations, partnerships or other agencies engaging in the collection and disposal of solid wastes are subject to this article. Governing bodies may assign territories, approve or disapprove disposal sites, with the concurrence of the health department, and shall establish and collect annual license fees from such

to regulate the exercise of that power, we find that portion of the Solid Wastes Disposal Act to be unconstitutional.

"We emphasize that not all of the powers granted to local authorities by § 22-27-5(b) are unconstitutional. It is the lack of standards and safeguards governing local approval or disapproval of waste disposal sites that makes the provision invalid."

—— So.2d at ——.

That court analogized § 22-27-5 to the Minus Act,[2] which was declared unconstitutional in *Browning-Ferris Industries of Alabama v. Pegues*, 710 F.Supp. 313 (M.D. Ala. 1987). In that case, the federal district court wrote:

"The constitutional vice of the Minus Act is the complete absence of standards. There simply are no guidelines spelled out in the provision that the legislature must individually approve any facility devoted solely to the storage of hazardous waste. In other words, the statute does not provide the faintest clue as to what an applicant should do or refrain from

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firms and set rate schedules if a service fee is charged. In addition to any other approvals which are necessary for any contract between private or corporate agencies and governmental entities for the disposal of solid wastes, approval of the department shall be obtained."

[2] Before it was amended effective April 12, 1988, the Minus Act, Code 1975, § 22-30-5.1, read as follows:

"(a) The term 'hazardous waste' shall mean the same as defined by section 22-30-3(5).

"(b) There shall be no more than one commercial hazardous waste treatment facility or disposal site as defined by subdivisions (3) and (15) of section 22-30-3 situated within any one county of the state. Provided, however, no commercial hazardous waste treatment or disposal site not in existence on or before November 19, 1980, shall be situated without resolution giving approval therefore. Provided, however, legislative approval shall not be required for industries with on site treatment, storage, and disposal of their own hazardous wastes."

> doing in order to secure legislative approval. If one applicant for a license is preferred over another as the result of a political favor or for no logical reason at all, the disappointed applicant is without redress under the Minus Act because the discretion of the Legislature is standardless and boundless."

Upon review, we find that the act here in question is distinguishable from the Minus Act and does not, in fact, suffer from a complete absence of standards.

A statutory scheme like that set forth in the Act for the approval or disapproval of disposal sites must be viewed as a whole in determining whether it provides adequate standards. See *McCausland v. Tide-Mayflower Moving & Storage*, 499 So.2d 1378, 1382 (Ala. 1986). As noted above, a county or local government cannot, without certain approvals, provide a solid waste collection and disposal facility. Any contract or agreement entered into by a governmental entity is reviewable by the health department and by ADEM. Consequently, any governmental entity undertaking to provide such services would likely consider health department and ADEM standards when it considers a request for approval of a site. Furthermore, under the Act no site can be permitted unless it is found to be in the best interests of the health, safety, and welfare of the affected citizenry.

The Act requires any agency contracting with the governmental entity to have the capability to service assigned territories, to pay annual license fees, to set rate schedules where appropriate, and to post a performance bond satisfactory to the governing body.

The Act not only requires that any license issued by a local government have the approval of the health department and ADEM; it further requires that the licensed agency also obtain separate permits from both the health department and ADEM. Code 1975, § 22-27-5(c). Those permits are renewable annually and are subject to revo-

cation for failure to perform under the provisions of the Act. Again, it is fair to assume that a licensing government would look to the standards for the issuance of permits by the health department and ADEM in determining whether to grant the initial license.

Pursuant to the Act, the health department is required to enforce sanitary requirements for the collection of solid wastes and ADEM is required to exercise regulatory control over the disposal of solid wastes. It should, therefore, be obvious to the licensing entity that any license issued must comply with health department collection regulations and ADEM disposal regulations.

What then are the standards by which a governmental entity reviews an application for a license to operate a collection and disposal facility? The list would include, but not necessarily be limited to, the following:

(1) The licensee *must* meet those standards set by the health department and ADEM that will be utilized to review the license, if approved.

(2) The proposed collection and disposal application must be in the best interests of the citizenry, taking into account its health, safety, and welfare.

(3) The licensee must be able to adequately service a designated or assigned area.

(4) The licensee must pay an annual license fee and a permit fee, if required, and must post a performance bond in an amount to be set by the governmental entity.

(5) The license [*sic*] must agree to function with predetermined rate schedules set by the licensing authority.

(6) Upon approval of a license application, the licensee must meet the standards set by the health department and ADEM in order to obtain permits from them.

(7) The licensee must meet all health department sanitary regulations for collection of solid wastes.

(8) All disposal plans must comport with ADEM disposal regulations.

As can be seen from the foregoing, the Act is far from standardless and, in fact, gives local and county governments much guidance in formulating reasonable standards to utilize in the licensing process established by the Act. Furthermore, when this Court construes a statute that is intended to protect the public health, " 'great latitude should be allowed to the legislature in determining the character of such laws, and how, when, and by whom, in their practical administration, they should be applied.' " *State v. Clayton*, 492 So.2d 665, 667 (Ala.Cr. App. 1986), quoting *Parke v. Bradley*, 204 Ala. 455, 456, 86 So. 28 (1920). Because one of the purposes of the Act is to protect the public health, the legislature, in selecting a method to guide the counties in policing this public interest, will be accorded great latitude by this Court.

We therefore find that the Act is not unconstitutional, and we conclude that the judgment of the Court of Civil Appeals on this point was in error.

The next issue raised by WCI relates to the method by which the Commission disapproved its license after initially approving it. WCI argues that its due process rights were violated when the Commission rescinded its prior approval without a hearing. Procedural due process is not properly afforded when one's life, liberty, or property interests are affected without prior notice and an opportunity for a hearing. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 310-11, 70 S.Ct. 652, 656-57 (1950). It is interesting to note that in this case WCI received the initial license without a hearing, but it does not argue that *that* violated due process. If WCI's due process rights were violated by the subsequent revocation of the license without a hearing, then certainly the due process rights of the affected citizenry were violated when the license was first issued without a hearing.

We agree with the Court of Civil Appeals in its conclusion that WCI's due process rights were violated, but we must further state that the original license should not have been issued without notice and an opportunity for a hearing.

As to WCI's argument that the Commission lacked the authority to approve or disapprove WCI's application, we find that it did not. It is clear from the Act that no waste collection and disposal site, unless specifically excepted by the Act, could legally operate without a license issued by a county or other local governmental entity. Although there are other approvals that must be obtained, unless an agency is excepted, it cannot operate without approval of the appropriate governmental agency. Accordingly, we reverse the Court of Civil Appeals' judgment as to this issue.

Several weeks after the Commission rescinded approval of the Greenbrier site, it adopted "License Requirements for Sanitary Landfills." [3] WCI argued that the Commis-

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[3] In pertinent part, the license requirements read as follows:

"Section 5. Location Factors

"(a) A license shall not be approved by the County Commission unless a permit for the sanitary landfill has been issued by the Alabama Department of Environmental Management.

". . . .

"Section 7. Fees, License Renewal and Revocation

"(a) The applicant for a license to construct and operate a sanitary landfill shall pay an application fee of $10,000 to the County Commission to defray the costs of renewing such application. Such fee shall accompany the application. Provided that the County shall not be required to pay an application fee for any sanitary landfill that it owns or operates.

"(b) The owner or operator of an approved sanitary landfill shall apply for license renewal annually. Provided, however, that the County shall not be required to reapply for any sanitary landfill that it owns or operates. The annual renewal fee shall be equal to 10% of the gross receipts of the landfill during the previous year, but shall not exceed a maximum of $50,000 per year. At the time of renewal application, the Com-

sion was without authority to do so, and that, even if it had authority to do so, those requirements were arbitrary and capricious.

On that point, the Court of Civil Appeals stated:

> "The county's requirements also provide that a license 'shall not be approved . . . unless a permit for the sanitary landfill has been issued by [ADEM].' § 5, paragraph (a), p. 6, 'License Requirements for Sanitary Landfills.' Under this provision, WCI and companies like it would be required to select a site that fulfills ADEM's requirements and complete the permitting process before knowing whether they could obtain the county's approval for the site. Disapproval of a site at that stage would inflict substantial economic harm upon such companies. In addition, the county's $10,000 application fee, over six times greater than the permit fee required by ADEM, is at least arbitrary and capricious, if not prohibitive."
>
> —— So.2d at ——.

We disagree. The language of the license requirements merely presumes the dual role between the county and ADEM as set forth in the Act. The Act itself does not specify a schedule that applicants must follow when seeking approval of a collection and disposal site. Thus, the Commission did not exceed its authority by requiring that, prior to its licensing of a site, an ADEM permit must be procured. Whether approval first comes from the county or from ADEM, it is a virtual certainty that any applicant would suffer some economic harm if the second agency should nullify the first agency's approval. Such is the risk that accompanies the permit process established by the Act.

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mission shall review the performance record of the owner or operator during the previous year and may deny the license renewal based upon poor performance, including any violation of the Alabama Solid Waste Management Regulations."

Finally, there was no evidence offered that would lend credence to a conclusion that permit fees as established by the Commission were "at least arbitrary and capricious, if not prohibitive." Such a determination could be made only by examining the total annual revenues expected to be derived by WCI from the operation of the landfill site. It is conceivable that this application fee would, indeed, be found to be reasonable should such an examination take place. Without such evidence before this Court, we will not decide whether the fee was arbitrary or capricious. *Chatman v. City of Prichard*, 431 So.2d 532, 533 (Ala. 1983). Accordingly, we reverse the judgment of the Court of Civil Appeals with regard to the licensing requirements adopted by the Commission, and we conclude that they are not inconsistent with the Act.

The judgment of the Court of Civil Appeals is reversed, and the cause is remanded.

REVERSED AND REMANDED.

Hornsby, C. J., and Maddox, Almon, Shores, Adams, Houston, and Steagall, JJ., concur.

Jones, J., not sitting.

APPENDIX B

THE STATE OF ALABAMA—
JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS

OCTOBER TERM 1988-89

Civ. 6718

WASTE CONTRACTORS, INC.

v.

STATE OF ALABAMA, LAUDERDALE COUNTY

Appeal from Lauderdale Circuit Court

INGRAM, Judge

Waste Contractors, Inc. (WCI) instituted this action against Lauderdale County after the county commission revoked its prior approval of a site for a solid waste disposal facility proposed by WCI (the Greenbrier site). The complaint was subsequently amended to add a constitutional issue, of which the attorney general was properly notified. The state then joined in the proceeding. After the trial court granted summary judgment for the county and state, WCI timely perfected this appeal.

WCI challenges a portion of Alabama's Solid Waste Disposal Act, § 22-27-1, et seq., Ala. Code 1975 (1984 Repl. Vol.), contending that § 22-27-5(b), which authorizes local governing bodies to "approve or disapprove disposal sites," delegates that power to local authorities

in an unconstitutional manner. WCI argues that legislation which delegates power to a county commission must contain substantive standards and procedural safeguards defining and limiting the exercise of such power and that the Solid Waste Disposal Act is standardless and boundless as to the approval or disapproval of sites. WCI also argues that the county's exercise of its disapproval power over the Greenbrier site was improper. In addition, WCI contends that, while the Alabama Department of Environmental Management (ADEM) is authorized to promulgate regulations pertaining to the site of a sanitary landfill, the county is precluded from doing so.

WCI began searching for a site in Lauderdale County for its proposed sanitary landfill in 1985. Four locations were considered, with the Greenbrier site being the one ultimately selected. The county itself had also considered that site for a landfill. In April 1987, the county commission unanimously adopted a resolution authorizing WCI to establish and operate a sanitary landfill at the Greenbrier site, provided all of ADEM's rules and regulations were met, and establishing an operational fee of $20,000 or one percent of revenues. In May, the commission unanimously approved an extension of the site. Then, in June, without notice to WCI and without any discussion, the Commission voted to disapprove the Greenbrier site. At that point, WCI had expended approximately $80,000 in the purchase of option contracts on land and the examination and analysis of potential sites.

During the investigation of the Greenbrier site, WCI began discussions with ADEM regarding a permit to operate a landfill at that site. WCI filed its formal permit application with ADEM in July 1987, which it continues to actively pursue.

The disputed provision of the Solid Waste Disposal Act states as follows:

> "(b) *Private or corporate agencies.*—Individuals, corporations, partnerships or other agencies engaging in the collection and disposal of solid wastes are subject to this article. *Governing bodies may assign territories, approve or disapprove disposal sites, with the concurrence of the health department, and shall establish and collect annual license fees from such firms and set rate schedules if a service fee is charged.* In addition to any other approvals which are necessary for any contract between private or corporate agencies and governmental entities for the disposal of solid wastes, *approval of the department [ADEM] shall be obtained.*" (Emphasis added.)

§ 22-27-5(b), Ala. Code 1975 (1984 Repl. Vol.).

The act further grants to ADEM regulatory power over all aspects of solid waste disposal.

> "With regard to the disposal of solid wastes, the department [ADEM] shall exercise such regulatory control over the management of solid wastes as may be necessary to enforce the requirements of the department, and *the department may adopt such rules and regulations as may be needed* to meet the requirements of this article." (Emphasis added.)

§ 22-27-7, Ala. Code 1975 (1984 Repl. Vol.).

ADEM has enacted comprehensive Solid Waste Management Regulations in order to exercise its regulatory control. Included therein are Solid Waste Disposal Siting Standards (§ 4-150) and requirements for notice and a public hearing on the merits of permit applications (§§ 4-182 and -83). The regulations do not, however, include guidelines to be applied by a county commission in approving or disapproving a site.

The Alabama legislature may delegate to counties and cities certain powers relating to local governments. *Wal-*

lace v. Board of Education of Montgomery County, 280 Ala. 635, 197 So. 2d 428 (1967).

> "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend."

Alabama Dairy Commission v. Food Giant, Inc., 357 So. 2d 139, 141 (Ala. 1978), quoting *Norton v. Lusk*, 248 Ala. 110, 122, 26 So. 2d 849, 859 (1946). We must then inquire whether the legislative authority has provided standards and safeguards along with the delegation of powers. *Bailey v. Shelby County*, 507 So. 2d 438 (Ala. 1987).

Section 22-27-5(b) essentially allows the counties in our state to have input regarding the location of waste disposal facilities within their boundaries; however, no standards to guide the local authorities or safeguards against arbitrary action are present anywhere within the Solid Waste Disposal Act.

The disputed portion of § 22-27-5(b) is similar to a provision in the Minus Act as originally drafted in 1981 (§ 22-30-5.1, Ala. Code 1975), which required a standardless legislative approval of any commercial hazardous waste treatment or disposal site if ADEM granted a permit to such facility. That provision was declared unconstitutional by the United States District Court for the Middle District of Alabama in *Browning-Ferris Industries of Alabama, Inc. v. Pegues*, No. 85-H-228-N (M.D. Ala. August 4, 1987). The case was then before the United States District Court for the second time. The trial judge had initially ruled that a determination regarding the validity of § 22-30-5.1 was not ripe for adjudication. The Eleventh Circuit reversed and remanded the case for consideration of the facial challenges to the Minus Act. *Browning-Ferris Industries of Alabama, Inc.*

v. Alabama Department of Environmental Management, 799 F.2d 1473 (11th Cir. 1986). In ruling on the merits of the case, the trial judge wrote as follows:

> "The constitutional vice of the Minus Act is the complete absence of standards. There simply are no guidelines spelled out in the provision that the legislature must individually approve any facility devoted solely to the storage of hazardous waste. In other words, the statute does not provide the faintest clue as to what an applicant should do or refrain from doing in order to secure legislative approval. If one applicant for a license is preferred over another as the result of a political favor or for no logical reason at all, the disappointed applicant is without redress under the Minus Act because the discretion of the Legislature is standardless and boundless."

Browning-Ferris Industries of Alabama, Inc. v. Pegues, *supra*, at 4-5.

Thereafter, § 22-30-5.1 was amended in 1988 to include a designation of criteria to be evaluated in determining whether to recommend approval of proposed sites for the disposal or treatment of hazardous wastes. We believe that similar criteria should be formulated to guide local authorities in the exercise of the power granted to them in § 22-27-5(b), particularly the power to disapprove sites.

The case before us is illustrative of the problems created by such a standardless and boundless statute. A county's approval of a site will ultimately be reviewed by ADEM to insure that a disposal facility is not injurious to the environment or citizenry of the area. On the other hand, nothing in the statute or ADEM's regulations prevents the disapproval of a site in an arbitrary and capricious manner. Here, because of the arbitrary nature of the approval process, WCI expended large amounts of time and money locating a site for a sanitary

landfill and received approval of the site from the county commission, only to suffer disapproval of the site shortly thereafter.

Not only does that kind of power adversely affect companies like WCI, but it has the potential for negative impact upon our state. Garbage and trash generated by our citizens must be disposed of somewhere, yet there are very few localities in which most of the citizens willingly accept the establishment of a landfill. The complex technical regulations and necessary equipment make waste disposal increasingly expensive, to the extent that it may no longer be practical or cost effective for disposal facilities to be located on a county-by-county basis.

Although the county in which a solid waste disposal facility is to be located should have input into the decision as to its site, the extensive ADEM regulations relating to site selection are meaningless if the site determination is subject, in the final analysis, to the disapproval of a county commission with no standards, rules, or guidelines to determine the basis for its decision. Because the grant of power to local governing bodies to approve or disapprove sites that presently exists in § 22-27-5(b) is totally devoid of standards to regulate the exercise of that power, we find that portion of the Solid Waste Disposal Act to be unconstitutional.

We emphasize that not all of the powers granted to local authorities by § 22-27-5(b) are unconstitutional. It is the lack of standards and safeguards governing local approval or disapproval of waste disposal sites that makes the provision invalid.

We now turn to WCI's claim that the action of the county at its June 1987 meeting violated procedural due process. The first element of due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objec-

tions." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Proper notice is a jurisdictional prerequisite to valid agency action." *Dirt, Inc. v. Mobile County Commission*, 739 F.2d 1562, 1566 (11th Cir. 1984). There was a total failure of notice to WCI that the commission was to review its prior approval of the Greenbrier site at the June meeting. "The second element of due process is the right to a hearing by an impartial tribunal." *Dirt, Inc., supra*, at 1566. The commission disapproved the site without discussion, so there obviously was no hearing on that issue. WCI was deprived of both elements of due process, and the county commission was, therefore, without authority to take the action it did.

We note, even though not presented to us as an issue in this case, that the action of the commission at its April and May meetings was also taken without notice to or an opportunity to be heard by the citizens of the affected area.

We also must address the question of exactly what power is granted to local governing bodies by the Solid Waste Disposal Act. Clearly, ADEM was granted the authority in § 22-27-7 to adopt the rules and regulations necessary to carry out its responsibilities under the act. Giving administrative agencies the power to make rules and regulations is a proper delegation of the legislative power of the state. *Bailey v. Shelby County, supra.*

The county, on the other hand, is granted limited authority in § 22-27-5(b). It may (1) assign territories, (2) approve or disapprove disposal sites, with the concurrence of ADEM, and (3) establish and collect annual license fees.

Shortly before WCI filed its lawsuit in the instant case, the county adopted "License Requirements for Sanitary Landfills," which contains siting standards and requirements for public hearings duplicative of ADEM's. The

county's license requirements also call for an application fee of $10,000 and a licensing fee of $50,000 or one percent of revenues. In contrast, ADEM's permit application fee is $1,500.

The county argues that its license requirements are not before this court. We disagree and will consider those requirements based on the rationale of *Browning-Ferris Industries of Alabama, Inc. v. Alabama Department of Environmental Management*, *supra*. The reversal of the trial court's initial ruling was based primarily on "the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The Eleventh Circuit found that requiring Browning-Ferris to proceed with its permit application without knowing whether the Minus Act was valid would impose a substantial potential hardship on the company. Even though the county adopted its "License Requirements for Sanitary Landfills" after its approval-disapproval of WCI's application, we think that these requirements must be tested here not only because they were adopted before suit was filed, but because they are viable matters which can have considerable effect on WCI's pursuit of its application for site approval.

The county's requirements are based upon the incorrect premise that it has the authority to "require licenses for disposal of solid wastes . . . pursuant to Section 22-27-5(b)." Paragraph (a), p. 1, "License Requirements for Sanitary Landfills." Counties are merely authorized to collect a license fee as compensation for any burden to the county that the operation of a solid waste facility entails. The county's requirements also provide that a license "shall not be approved . . . unless a permit for the sanitary landfill has been issued by [ADEM]." § 5, paragraph (a), p. 6, "License Requirements for Sanitary Landfills." Under this provision, WCI and companies like it would be required to select a site that fulfills ADEM's requirements and complete the permitting

process before knowing whether they could obtain the county's approval for the site. Disapproval of a site at that stage would inflict substantial economic harm upon such companies. In addition, the county's $10,000 application fee, over six times greater than the permit fee required by ADEM, is at least arbitrary and capricious, if not prohibitive.

Our legislature has granted to ADEM the responsibility of developing and enforcing the regulation of solid waste disposal on a uniform basis throughout the state. An individual county cannot take upon itself the authority to regulate the environmental standards imposed upon a proposed site. The county's license requirements clearly exceed the proper exercise of its statutory power.

In view of our holding that the standardless grant of power to local authorities in § 2-2-27-5(b) [*sic*] to approve or disapprove disposal sites is unconstitutional, we find that the county's June 1987 recission of its contract with WCI is null and void.

The trial court's judgment in this case is reversed, and the cause is remanded to the trial court for any further proceedings consistent with this opinion.

In view of the foregoing, other issues raised by WCI are pretermitted.

REVERSED AND REMANDED.

Bradley, P.J., and Holmes, J., concur.

APPENDIX C

IN THE CIRCUIT COURT
THE STATE OF ALABAMA
COUNTY OF LAUDERDALE

Case No. CV-87-460

WASTE CONTRACTORS, PLAINTIFF,

v.

LAUDERDALE COUNTY, DEFENDANT.

SUMMARY JUDGMENT

THIS MATTER coming before the Court on Motion for Summary Judgment, filed by defendant Lauderdale County, and the Court having considered all evidence properly before the Court offered in support of, and in opposition to, said Motion for Summary Judgment, it is

CONSIDERED, ORDERED and ADJUDGED as follows:

1. Plaintiff's prayer that the June 22, 1987 action of the Lauderdale County Commission in rescinding its prior permit granted to Waste Management be declared of no force and effect, is hereby denied.

2. Plaintiff's prayer that defendant Lauderdale County be enjoined from enforcing or effectuating its rescission of June 22, 1987, is hereby denied.

3. Plaintiff's prayer that defendant Lauderdale County be enjoined from enforcing or attempting to enforce the

"license requirements for sanitary landfills", adopted by the Lauderdale County Commission on the 10th day of August, 1987, is hereby denied.

4. Plaintiff's prayer that the "license requirements for sanitary landfills" be declared null, void and of no force and effect is hereby denied.

5. Plaintiff's prayer that this Court determine that certain action of the Lauderdale County Commission permanently delegated all further administrative and regulatory authority to the Alabama Department of Environmental Management is hereby denied.

6. The Court specifically FINDS, DECLARES, and ADJUDGES that defendant Lauderdale County Commission acted reasonably and with legal authority in denying a license to operate a sanitary landfill to plaintiff by the Commission's action on June 22, 1987.

Even if the prior action by the Lauderdale County Commission on April 4, 1987, and May 11, 1987, can be conidered a license; for what length of time was such license granted? A local governing body surely must be allowed, under the circumstances at hand, to rescind its prior actions if it appears the health and general welfare of its citizens would be well served. To hold otherwise would prevent a governing body from acting in the best interests of its citizens when new or different information arises from time to time, and would subject present and future citizens to the effects and results of certain governmental action even though such action may have been improvidently taken initially.

7. The Court further FINDS, DECLARES, and ADJUDGES that defendant Lauderdale County Commission has the authority under Alabama law to approve or disapprove disposal sites for sanitary landfills, and without such approval and licensing by the Lauderdale County Commission, plaintiff Waste Contractors has no authority

to construct nor operate a sanitary landfill in Lauderdale County, Alabama.

8. All other affirmative relief sought by plaintiff is hereby denied.

9. That a copy of this order be forwarded by the Clerk to the Alabama Department of Environmental Management, Montgomery, Alabama.

DONE and ORDERED at Florence, Alabama, this the 29th day of April, 1988.

/s/ Edward Tease
Circuit Judge

xc: Hon. Robert Gonce
Hon. Thomas Wells, Jr.
Hon. Bart Slawson

Alabama Department of Environmental Management

IN THE CIRCUIT COURT
THE STATE OF ALABAMA
COUNTY OF LAUDERDALE

Case No. CV-87-460

WASTE CONTRACTORS, INC., PLAINTIFF,

v.

LAUDERDALE COUNTY, DEFENDANT.

ORDER

THIS CAUSE coming on to be heard on the following:

1. Motion by Plaintiff to Alter or Amend the Summary Judgment entered by the Court on April 29, 1988.

2. Motion for Summary Judgment by Plaintiff under Counts eight, nine and ten of its amended complaint.

3. Motion by Defendant Lauderdale County to Strike Plaintiff's amended complaint adding Counts eight, nine and ten.

4. Motion for Summary Judgment by State of Alabama.

The Court having considered the pleadings, the oral argument of attorneys of record, and the briefs submitted by the respective parties, it is

CONSIDERED, ORDERED and ADJUDGED as follows:

1. Defendant Lauderdale County's Motion to Strike is hereby denied.

2. In response to Plaintiff's Motion to Alter or Amend the Summary Judgment entered April 29, 1988, the Court hereby declares that said Summary Judgment did not address the additional Counts eight, nine and ten embraced in Plaintiff's amended complaint. Those counts remain before the Court and are properly addressed in the Motions for Summary Judgment now pending by Plaintiff Waste Management and the State of Alabama.

3. Motion for Summary Judgment by Plaintiff Waste Management under Counts Eight, Nine and Ten of the amended complaint is hereby denied.

4. All parties agree to submit the Motion for Summary Judgment of the State of Alabama without further setting or hearing. The State's Motion for Summary Judgment with respect to the grounds of unclean hands, laches and estoppel is hereby denied.

The Motion for Summary Judgment of the State of Alabama with respect to the presumption of constitutionality is hereby granted. The Court hereby ADJUDGES and DECLARES Section 22-27-5(b) of the Code of Alabama, 1975 and its application to the facts presented in this cause to be valid and not violative of the Constitution of the United States or the Constitution of the State of Alabama.

5. Costs of this action hereby taxed to Plaintiff.

DONE and ORDERED at Florence, Alabama, this the 10th day of June, 1988.

/s/ Edward Tease
Circuit Judge

xc: Hon. Thomas Wells
Hon. Robert Gonce
Hon. Ray Vaughan
Hon. Bart Slawson

APPENDIX D

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

MAILING ADDRESS: TELEPHONE: 261-4609

P.O. Box 157
Montgomery, Alabama 36101

Re: _____

88-557 - Ex parte: Lauderdale County

88-583 - Ex parte: State of Alabama

PETITIONS FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(Re: Waste Contractors, Inc., Appellant vs. State of Alabama, Lauderdale County, Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

—— Appeal docketed. Future correspondence should refer to the above number.

——Court Reporter granted additional time to file reporter's transcript to and including

—— Clerk/Register granted additional time to file clerk's record/record on appeal to and including

—— Appell——granted 7 additional days to file briefs to and including

—— Appellant(s) granted 7 additional days to file reply briefs to and including

—— Record on Appeal filed

—— Appendix Filed

—— Submitted on Briefs

—— Petition for Writ of Certiorari denied. No opinion.

xxxx Application for rehearing overruled. No opinion written on rehearing.

Per Curiam—Hornsby, CJ., Maddox, Almon, Shores, Adams, Houston, Steagall and Kennedy, JJ., concur.

—— Permission to file amicus curiae brief granted

/s/ Robert G. Esdale
ROBERT G. ESDALE, Clerk
Supreme Court of Alabama

4/6/90
bsa

Supreme Court, U.S.
FILED
SEP 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 90-235

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

WASTE CONTRACTORS, INC., PETITIONER

v.

LAUDERDALE COUNTY COMMISSION
AND THE STATE OF ALABAMA,
RESPONDENTS

BRIEF OF LAUDERDALE COUNTY COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Robert L. Gonce*
GONCE, YOUNG & WESTBROOK
109 North Court Street
Florence, Alabama 35630
(205) 767-7411

R. Craig Kneisel
Robert D. Tambling
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

*Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did Waste Contractors, Inc. obtain a property interest protected by the Due Process Clause in an approval granted by the Lauderdale County, Alabama Commission to operate a landfill where the approval was obtained by fraud?

2. Did Waste Contractors, Inc. obtain a property interest protected by the Due Process Clause in an approval granted by the Lauderdale County, Alabama Commission to operate a landfill where the approval was rescinded 69 days later before Waste Contractors, Inc. expended substantial amounts in reliance on the approval?

3. Did Waste Contractors, Inc. obtain a property interest protected by the Due Process Clause in an approval granted by the Lauderdale County, Alabama Commission but revoked prior to any application being filed with the Alabama Department of Environmental Management where Alabama law requires an operating permit by the Alabama Department of Environmental Management to establish a landfill?

4. Are the issues between these parties moot where:

   A. Alabama law required approval by local government and an operating permit from the Alabama Department of Environmental Management prior to establishing a landfill;

   B. The Lauderdale County, Alabama Commission granted approval but rescinded it prior to an application for operating permit being filed with the Alabama Department of Environmental Management;

   C. Prior to obtaining an operating permit the Alabama Legislature enacted legislation known as the Solid Waste Management Plan, (May 16, 1989) providing that no landfill permits may be issued in Alabama during a 24 month period during which local governments, regional commissions and the state will develop proper standards and procedures approved by the Alabama Department of Environmental Management for permitting such landfills?

5. Should petition for certiorari be granted where petitioner's real complaint is not that due process was not extended to it but was extended to others?

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....vii

STATEMENT OF FACTS.....1

REASONS WHY PETITION SHOULD BE DENIED 9

I. WASTE CONTRACTORS, INC. OBTAINED NO PROTECTED PROPERTY INTEREST IN THE APPROVAL BECAUSE THE APPROVAL WAS OBTAINED BY FRAUD UNCHALLENGED IN THE TRIAL COURT 9

II. WASTE CONTRACTORS, INC. ACQUIRED NO VESTED PROTECTED PROPERTY INTEREST IN THE APPROVAL BECAUSE IT DID NOT MAKE SUBSTANTIAL EXPENDITURES IN RELIANCE UPON THE APPROVAL BEFORE IT WAS RESCINDED.....13

TABLE OF CONTENTS
(Continued)

Page(s)

III. WASTE CONTRACTORS, INC. DID NOT ACQUIRE A PROTECTED PROPERTY INTEREST IN THE COMMISSION'S APPROVAL BECAUSE ALABAMA LAW REQUIRES AN OPERATING PERMIT FROM THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT BEFORE ESTABLISHING A LANDFILL.....15

IV. THE ISSUES BETWEEN THESE PARTIES ARE NOW MOOT BECAUSE WASTE CONTRACTORS, INC. HAS NEVER OBTAINED AN OPERATING PERMIT FROM THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT AND NO PERMIT CAN BE ACQUIRED UNTIL STANDARDS AND PROCEDURES ARE IN PLACE UNDER THE SOLID WASTE MANAGEMENT PLAN ENACTED WHILE THIS LITIGATION WAS PENDING - THE LANDFILL WILL OR WILL NOT BE PERMITTED DEPENDING ON WHETHER IT MEETS THE NEW STANDARDS 18

TABLE OF CONTENTS
(Continued)

Page(s)

V. THE ISSUES BETWEEN THESE PARTIES ARE MOOT AND WASTE CONTRACTORS, INC.'S REAL PURPOSE IS TO CREATE PRECEDENT DENYING OTHERS A RIGHT TO HEARING AND NOTICE 24

CONCLUSION 31

TABLE OF AUTHORITIES

Cases — Page(s)

City of Tuscaloosa v. Bryan, 505 So.2d 330 (Ala. 1987).....27

Codd v. Velger, 429 U.S. 624 (1977) 11

Cox v. Poer, 45 Ala. App. 295, 229 So.2d 797 (1969).....27

Four Seasons' Apartments v. City of Mayfield Heights, 775 F.2d 150 (6th Cir. 1985).....14

Godson v. Town of Surfside, 150 Fla. 614, 8 So.2d 497 (1942).....10

In Re Pierce's Appeal, 347 P.2d 790 (Okla. 1959) 10

Keiger v. Winston-Salem Board of Adjustment, 190 S.E.2d 175 (N.C. 1972).....14

Logan v. Zimmerman Brush Co. 455 U.S. 422, 430 (1982).....16

Lynnwood Property Owners Ass'n v. Lands Described, 359 So.2d 357 (Ala. 1978).....28,29

TABLE OF AUTHORITIES
(Continued)

Page(s)

Masters v. Pruce, 290 Ala. 56, 274 So.2d 33 (1973).....30

Paul v. Davis, 424 U.S. 693 (1976) 15

Save Our Dunes v. Alabama Department of Environmental Management, 834 F.2d 984, (11th Cir. 1987) 26

Constitutions and Statutes:

United States Constitution, Amend. XIV .....passim

Alabama Constitution, Article 1,§§ 1, 6, & 22 28

Ala. Code §22-27-1 et seq. (1975).....2,24

Ala. Code §22-27-5(b) (1975).....2,16

Ala. Code §22-27-7 (1975).....2

Ala. Code §22-27-40 (1975).....8,18, 19

Ala. Code §22-27-47 & 48 (1975).....22

Ala. Code §22-27-49 (1975).....8,22

NO. 90-235

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

WASTE CONTRACTORS, INC.,
PETITIONER

v.

LAUDERDALE COUNTY COMMISSION AND
THE STATE OF ALABAMA, RESPONDENTS

BRIEF OF LAUDERDALE COUNTY COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

STATEMENT OF FACTS

Waste Contractors, Inc. has never held a permit to establish a landfill at the Greenbrier site in Lauderdale County, Alabama.

In 1969 the Alabama Legislature enacted the Solid Wastes Disposal Act

Ala. Code 22-27-1 et seq. (1975). Section 22-27-5(b) gives local governments the power to assign territories for the collection and disposal of waste, to approve or disapprove disposal sites, to establish and collect annual licensing fees and set rate schedules if a service fee is charged. The Solid Wastes Disposal Act further established the Alabama Department of Environmental Management (ADEM) as the regulator of solid waste disposal. Ala. Code §22-27-7 (1975). In exercise of this regulatory power, ADEM has enacted over fifty sections of regulations devoted to solid waste landfills. A sampling of the titles of these various sections -- Siting Standards, Site Geology and

Hydrology, Ground Water Resources, Drainage, Liners--evidences the comprehensive nature of ADEM's regulations. A landfill cannot be operated until ADEM regulations are complied with and an operating permit is issued by it.

On April 14, 1987 Waste Contractors, Inc. ("WCI") applied to the Lauderdale County Commission for approval to operate a landfill at the Greenbrier site. At the time the application for approval was made and granted, no presentation was made to the Commission nor was a hearing held. On May 11, 1987, the area of the landfill was increased, also without any such presentation, hearing or discussion.

While no presentation or hearing was had at the time the approval was given, prior discussion had taken place between Larry McCullough, General Manager of WCI, and Judge William B. Duncan, Judge of Probate and Chairman of the Lauderdale County Commission. In these discussions Mr. McCullough had represented to Judge Duncan and the Commission that the Greenbrier site would handle no more than 350 tons of solid waste per day. WCI answered the Commission's Interrogatory 7 propounded in the trial court as follows:

"7. State the maximum amount of solid waste which you will dispose of in the landfill in question on a daily basis, weekly and monthly."

Waste Contractor, Inc.'s sworn answer was:

"7. As disclosed to the Lauderdale County Commission and to the Citizens of Lauderdale County as early as August, 1985, Waste Contractors anticipates at this time that the landfill in question will accept about 350 tons of waste daily."

(R-185 & 186, Interrogatory 7, R-55, and answer R-69)

These representations were false and rather than a small local landfill to handle local needs, WCI was planning a huge regional landfill which would handle over five times the amount of solid waste represented to Judge Duncan and the Commission from its inception. Correspondence from WCI to the Alabama Department of Environmental Management dated March 14, 1988, contained the following statements:

1. "Greenbrier has been designed and planned as a regional landfill."

2. "Thus, a regional sanitary landfill is the only concept that can make sense for private investment."

3. "Given our planned initial gate schedule of a 10-hour day and three operators of three pieces of landfill equipment (i.e., D-7 dozer, 826 compactor and 677 scrapper) the initial loading thresholds would be in the area of 1,800+ tons per day. This threshold is not a site capacity by any means and would be increased if demand is there by merely adjusting the variables referred to above."

(R-181 & 132) (Emphasis added)

This evidence of WCI's fraud uncovered by discovery in the lawsuit filed against the Commission was not controverted by any evidence before the Trial Court which granted summary judgment to the Commission.

On June 20, 1987, sixty-nine days after approval of the landfill was

granted, the Lauderdale County Commission rescinded the approval. At the time the approval was rescinded WCI had not applied for an operating permit from the Department of Environmental Management and has never been granted such a permit though it was applied for in July, 1987.

Between the dates approval was granted and rescinded (April 14, 1987 to June 27, 1987), WCI spent very little money in reliance on the approval. WCI's answers to interrogatories show items amounting to $11,000 or less plus $30,000 paid for options on real estate. (R-68) Actual purchase of real estate occurred after the approval was rescinded. (R-100-104) Presumably WCI paid reasonable cash market value for the real estate and still owns it.

In 1989 the Alabama Legislature enacted the Solid Waste Management Plan. Ala. Code 22-27-40 et seq. (1975). The Act became effective on May 16, 1989. At that time WCI did not have and still has no operating permit to establish the landfill. The Act provides for the development of standards and procedures for local governments, regional commissions and the state for the licensing of landfills. Ala. Code §22-27-49 (1975) provides that no permits may be issued for the operation of landfills for a period of 24 months while the standards and procedures are being developed. WCI has no such permit and has not physically developed or operated a landfill at this site. At the end of the 24 month period the site will or

will not be licensed depending upon whether WCI can comply with the standards or procedures. It cannot obtain an operating permit in the meantime.

REASONS WHY THE PETITION SHOULD BE DENIED

I. WASTE CONTRACTORS, INC. OBTAINED NO PROTECTED PROPERTY INTEREST IN THE APPROVAL BECAUSE THE APPROVAL WAS OBTAINED BY FRAUD UNCHALLENGED IN THE TRIAL COURT.

The undisputed evidence before the Trial Court on motion for summary judgment was that WCI had represented to the Lauderdale County Commission that the landfill in question would be a small landfill for the purpose of meeting local needs. These

representations were made to obtain the approval. WCI's sworn answers to interrogatories and its own correspondence to the Alabama Department of Environmental Management proved that the representation was false and that WCI intended a large, regional landfill initially handling five times the amount of garbage represented to the Commission. WCI did not acquire a vested right to the approval since it was obtained by fraud. Godson v. Town of Surfside, 150 Fla. 614, 8 So.2d 497 (1942). In Re Pierce's Appeal, 347 P.2d 790 (Okla. 1959).

WCI chose not to challenge the truth of the evidence of fraud in the Trial Court where it had every opportunity to do so. Instead it chose

to attack the statute granting the right to approve or disapprove tc local governments on the ground that the Alabama Legislature had not included proper standards and procedures in the statute. In effect it said: "So what if there is evidence of fraud from our correspondence and sworn answers to interrogatories, we didn't need to get approval from the Commission in the first place."

In Codd v. Velger, 429 U.S. 624 (1977) this Court held that the plaintiff's rights under the Due Process Clause were not violated where a non-tenured city employee was not given a hearing prior to dismissal due to the stigmatizing effect of certain material placed in his personnel file where the employee did not challenge

the substantial truth of the material in question. The opinion of the Court stated:

> "Our discussion here rests upon no overly technical application of the rules of pleading. Even conceding the respondent's termination occurred solely because of the report of an apparent suicide attempt, a proposition which is certainly not crystal clear on this record, respondent has at no stage of this litigation affirmatively stated that the "attempt" did take place as reported. The furthest he has gone is a suggestion by his counsel that "it might have all been a mistake, it could also have been horseplay." This is not enough to raise an issue about the substantial accuracy of the report. Respondent has therefore made out no claim under the Fourteenth Amendment that he was harmed by the denial of the hearing, even were we to accept in its entirety the determination by the Court of Appeals that the creation and disclosure of the file report otherwise amounted to stigmatization within the meaning of Board of Regents v. Roth, supra."

429 U.S. 624, 627 & 628 (1977)

WCI failed to challenge the truth of the allegations and proof that it obtained the Commission's approval by fraud when it had an opportunity to do so in the Trial Court. It did not acquire a vested protected property interest in the approval obtained by such fraud.

II. WASTE CONTRACTORS, INC. ACQUIRED NO VESTED, PROTECTED PROPERTY INTEREST IN THE APPROVAL BECAUSE IT DID NOT MAKE SUBSTANTIAL EXPENDITURES IN RELIANCE UPON THE APPROVAL BEFORE IT WAS RESCINDED.

The issuance of a permit creates no vested right unless the permittee, acting in good faith has made substantial expenditures in reliance upon the permit before it was

rescinded. Four Seasons' Apartments v. City of Mayfield Heights, 775 F.2d 150 (6th Cir. 1985)., Keiger v. Winston-Salem Board of Adjustment, 190 S.E.2d 175 (N.C. 1972). WCI's answers to interrogatories showed an expenditure of less than $11,000 plus $30,000 paid for options on real estate after the approval was given and before it was revoked.

Expenditures made before the approval was granted and after it was rescinded were not made in reliance on the approval. Substantial expenditures were not made and WCI had no vested, protected property interest in the approval.

III. WASTE CONTRACTORS, INC. DID NOT ACQUIRE A PROTECTED PROPERTY INTEREST IN THE COMMISSION'S APPROVAL BECAUSE ALABAMA LAW REQUIRES AN OPERATING PERMIT FROM THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT BEFORE ESTABLISHING A LANDFILL.

WCI makes the following observations on pages 10 and 11 of its petition:

> "The starting point in determining whether an individual has a constitutionally protected liberty or property interest is whether the asserted interest is grounded in an independent source such as the state law. But not every interest grounded in state law is protected by the Due Process Clause. See e.g., Paul v. Davis, 424 U.S. 693, 710-712 (1976). Rather, this Court has identified several criteria that must be applied to ascertain whether an interest with some basis in state law rises to the level of a property interest protected by the Due Process Clause.

> First, a court must assess the concreteness of the asserted interest; in other words, is the entitlement firmly defined by state law? See Leis, 439 U.S. at 441-443, Roth, 408 U.S. at 577-578. The more closely an interest resembles a right of ownership or a right defined by contract, the more likely compliance with due process will be required before the government may take it away. If, on the other hand, state law holds that the nature and scope of the asserted interest turns on the exercise of un-guided discretion, the interest is not likely to be sufficiently concrete to give rise to a constitutionally protected entitlement. "The hallmark of property *** is an individual entitlement grounded in state law, which cannot be removed except for cause.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982)

The Alabama law gives the local government the power to approve or disapprove landfill sites. Ala. Code 22-27-5(b) (1975) However, it is the Alabama Department of Environmental Management ("ADEM") which is the real regulator of solid waste disposal. An

operating permit for a landfill cannot be acquired until ADEM's environmental standards and procedures have been complied with and then ADEM issues the permit. The Commission granted approval and sixty-nine days later rescinded it. At that time WCI had not filed an application for an ADEM permit and had not complied with ADEM's standards and procedures. Looking to state law WCI did not have a protected property interest and in fact had not applied for such an interest when the Commission rescinded its approval.

IV. THE ISSUES BETWEEN THESE PARTIES ARE NOW MOOT BECAUSE WASTE CONTRACTORS, INC. HAS NEVER OBTAINED AN OPERATING PERMIT FROM THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT AND NO PERMIT CAN BE ACQUIRED UNTIL STANDARDS AND PROCEDURES ARE IN PLACE UNDER THE SOLID WASTE MANAGEMENT PLAN ENACTED WHILE THIS LITIGATION WAS PENDING - THE LANDFILL WILL OR WILL NOT BE PERMITTED DEPENDING ON WHETHER IT MEETS THE NEW STANDARDS.

While this case was pending in the appellate courts of Alabama the Alabama Legislature enacted the Solid Waste Management Plan. Ala. Code §22-27-40 et seq. (1975). At the time this legislation became effective (May 16, 1989) WCI had no operating permit from the Alabama Department of Environmental Management ("ADEM"). In fact its approval from Lauderdale County had been rescinded prior to any application

for such a permit. The Act contains the following legislative findings:

§22-27-40.

The legislature finds that:

(a) The state, its subdivisions and the nation face an emerging crisis in solid waste management;

(b) Proper waste management is an increasingly complex issue involving the need for reducing the volumes of waste requiring disposal, properly managing wastes to reduce the likelihood of both short-term and long-term threat to human health and the environment, and assuring that adequate, environmentally secure, waste management and disposal facilities will be available at reasonable costs to accommodate wastes generated in the state;

(c) Provision for necessary systems, facilities, technology and services for solid waste management and resource recovery is a matter of important public interest and concern, and action taken

in this regard will be for a public purpose and will benefit the public welfare;

(d) Solid waste management problems are potentially statewide in scope and necessitate state and local action through the development and implementation of comprehensive long-range plans for solid waste management which recognize the conditions in the state now and those which can be expected in the foreseeable future, and which serve to assure that the state as a whole and local jurisdictions in particular will meet their long-term solid waste management needs;

(e) Proper planning for solid waste management must include the evaluation of facility sites based on a broad group of factors including, but not limited to, environmental conditions, local needs for waste management, social and economic impacts on the host community, the availability and impact on public services, and the consistency of a proposed facility with any final solid waste management plan;

(f) Proper solid waste management planning also should provide leadership in the application of new and improved methods and processes to reduce the amount of solid waste that must be disposed of and to promote environmentally acceptable and economically sound solid waste management;

(g) The failure or inability to economically recover and recycle materials and energy resources from solid waste results in the unnecessary waste and depletion of natural resources;

(h) The landfill disposal of solid waste, even under the most ideal conditions, has the potential to create long-term pollution and environmental degradation;

(i) Current conditions and pending federal regulatory requirements likely will increase the costs of landfill disposal, prompt the closure of many landfills in the state and likely change the methods of solid waste management in the state away from the present system of management by individual cities and counties and toward the development of larger

> facilities which must be capable of meeting the needs of several jurisdictions. Given this evolving situation, the legislature concludes that a concerted solid waste management planning program is essential to address the imminent and future needs of the state.

Ala. Code §22-27-47 & 48 of the Act provide for the development and implementation of local, regional and state plans in regard to the issuing of any permits for landfills. The Act sets out in detail the criteria to be used by local governments in developing such standards and procedures and provides that those standards and procedures must be approved by the Alabama Department of Environmental Management. Ala. Code §22-27-49 provides that no permits may be issued

for the operation of landfills for a period of 24 months after which the standards and procedures for licensing will be in place. The Act applies to the site in question because WCI has never acquired a license or permit to develop or operate this landfill. If WCI complies with the standards and procedures developed under the Solid Waste Management Plan the landfill will receive an operating permit. All issues between these parties which arose prior to the enactment of this legislation are now moot. The issue in regard to whether WCI will acquire an operating permit is whether it can comply with standards and procedures developed under the Solid Waste Management Plan -- not whether it can obtain notice and hearing in regard to

Commission approval under the old Solid Wastes Disposal Act. (Ala. Code §22-27-1, et seq.) (1975).

V. THE ISSUES BETWEEN THESE PARTIES ARE MOOT AND WASTE CONTRACTORS, INC.'S REAL PURPOSE IS TO CREATE PRECEDENT DENYING OTHERS A RIGHT TO NOTICE AND HEARING.

This case is now of no consequence in regard to whether or not WCI acquires a permit to operate the Greenbrier site. WCI's real complaint is that the Alabama Supreme Court in its decision indicated that other persons who were affected by the approval were entitled to notice and hearing. Apparently these are persons who WCI does not want to have such right and seeks to establish that precedent in this case.

WCI argues that the Alabama Supreme Court has engaged in a pattern of unconstitutional behavior, the last incident being this case where the Alabama Court indicated in its opinion that affected citizenry have a right to notice and hearing when the government considers permitting a large landfill. How has the Alabama Court violated the letter or spirit of the Constitution by declaring that someone who may have invested his or her life savings in a home has a right to notice and hearing before the government licenses a huge garbage dump next door? Why does WCI complain that these people merely be given the right to notice and to be heard before this happens? What standing does WCI have to complain about the right to notice and hearing being extended to others?

WCI makes the assertion in its brief that every court to consider the question of whether such affected citizens have a right to notice and hearing has decided this question differently from the decision of the Alabama Supreme Court. It then cites Save Our Dunes v. Alabama Department of Environmental Management, 834 F.2d 984, 988-989 (11th Cir. 1987). While the Court held in that case that aesthetic, environmental or recreational concerns alone do not confer "aggrieved party status" under Alabama law giving a person a right to challenge and appeal decisions of the Alabama Department of Environmental Management it did state that persons owning land in the vicinity affected by the decision would

have such right. The Court quoted Cox v. Poer, 45 Ala. App. 295, 229 So.2d 797 (1969) as follows:

> "This, in addition to showing the proximity of one property to the other, requires proof of the adverse affect the changed status of the rezoned property has, or could have, on the use, enjoyment and value of the property of the protestant."

On page 11 of the Petitioner's petition, WCI, cites three Alabama cases as examples of the Alabama Court's violation of the Constitution by extending the right to notice and to be heard to property owners whose property may be affected by a land use decision. The first case is City of Tuscaloosa v. Bryan, 505 So.2d 330 (Ala. 1987). In this case adjoining

property owners brought a declaratory judgment action and suit for injunction against city officials alleging their violation of the City's own zoning ordinances. The trial court found for the plaintiffs and its opinion stated as follows:

> "26. The City of Tuscaloosa deprived the plaintiffs of due process of law under Article 1, §§1,6 and 22 of the Constitution of Alabama. See e.g., Lynnwood Property Owners [Ass'n] supra. (In light of the Court's ruling, it is unnecessary to decide whether the plaintiff's federal constitutional claims are viable.)" (Emphasis supplied.)

The Alabama Supreme Court affirmed the decision with no mention of federal due process rights and did not in any way deal with the Due Process Clause of the U. S. Constitution.

The second case cited by WCI is Lynnwood Property Owners Ass'n v. Lands Described, 359 So.2d 357 (Ala. 1978). This case is also a declaratory judgment action by a property owners association filed against city officials alleging a violation of the city's own zoning laws and regulations. The Alabama Supreme Court decided the case in favor of the property owner's association making the following observation:

> "To allow the Commission to ignore its own bylaws and regulations with impunity would foster impermissible arbitrariness of our city governments. The mandates of procedural due process of law prevent such actions. Therefore, we hold that Lynnwood was deprived of procedural due process when the Commission reviewed and reconsidered Dr. Ray's zoning

> amendment application which previously had been disapproved at the preceding monthly meeting. Fairness requires that the Commission follow its own rules. The public, or at least those whose interests are affected by a zoning amendment, has the right to rely upon the Commission's following its own ordinances. McArthur, supra."

The third case, Masters v. Pruce, 290 Ala. 56, 274 So.2d 33 (1973) was a suit brought by residential property owners seeking to enjoin County officials and to declare zoning laws unconstitutional. The Alabama Supreme Court held these laws to violate due process because they allowed the adoption of zoning ordinances without notice to anyone and in particular without notice to affected property owners whose property was being zoned.

These cases cited by WCI hardly show a pattern of unconstitutional behavior by the Alabama Supreme Court.

CONCLUSION

The petition for certiorari should be denied because Waste Contractors has no protected property interest in the approval of the Commission since:

1. It did not challenge the evidence before the Trial Court on summary judgment that the approval was void because it had been obtained by WCI's fraud;

2. WCI had not expended substantial amounts in reliance on the approval before it was rescinded;

3. The approval was rescinded prior to any application for an operating permit from the

> Alabama Department of Environmental Management and WCI has never acquired such a permit without which it cannot develop or operate a landfill on the site in question.

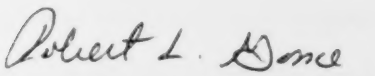
In addition, the issues between these parties are moot. WCI must now comply with procedures and standards of Alabama's Solid Waste Management Plan in order to develop and operate the landfill. It is now of no consequence whether WCI obtained approval or not from the Commission under the Solid Wastes Disposal Act. If it complies with the standards and procedures of the Solid Wastes Management Plan the site will be permitted; if not, it will not be permitted.

Waste Contractors' only real purpose here is to set precedent

overturning the Alabama Court's opinion that persons other than Waste Contractors have a right to notice and hearing before landfill permits are issued. The Alabama Court described these other persons as "affected citizenry." Waste Contractors has no standing to complain that in Alabama these persons are given the right by the Alabama Supreme Court to at least notice and a right to be heard before decisions are made which may have disastrous consequences for the value and enjoyment of their property - their homes. We live in an open society where freedom of speech and press are revered. How have Waste Contractors' constitutional rights been diminished by the Alabama Court declaring that

these affected citizens have a right to some notice and a right to be heard before such decisions are made?

Respectfully submitted,



Robert L. Gonce*
GONCE, YOUNG & WESTBROOK
109 North Court Street
Florence, AL 35630
(205) 767-7411

*Counsel of Record

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No. 90-235

In the Supreme Court of the United States

OCTOBER TERM, 1990

WASTE CONTRACTORS, INC., PETITIONER

v.

LAUDERDALE COUNTY COMMISSION AND THE STATE OF ALABAMA, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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REPLY BRIEF FOR THE PETITIONER

ANDREW J. PINCUS *
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 778-0628

H. THOMAS WELLS, JR.
JAMES L. PRIESTER
Maynard, Cooper, Frierson & Gale, P.C.
1901 Sixth Avenue, North
2400 AmSouth/Harbert Plaza
Birmingham, AL 35203-2602
(205) 254-1000

* *Counsel of Record*

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TABLE OF AUTHORITIES

Cases: Page

Bell v. *Burson*, 402 U.S. 535 (1971) 4
Board of Regents v. *Roth*, 408 U.S. 564 (1972) 3-4
Codd v. *Velger*, 429 U.S. 624 (1977) 3
Four Seasons Apartment v. *City of Mayfield Heights*, 775 F.2d 150 (6th Cir. 1985) 4
Garcia v. *Lawn*, 805 F.2d 1400 (9th Cir. 1986) 5
Herwald v. *Schweiker*, 658 F.2d 359 (5th Cir. Unit A 1981) 6
Kasparek v. *Johnson County Board of Health*, 288 N.W.2d 511 (Iowa 1980) 4
Keiger v. *Winston-Salem Board of Adjustment*, 190 S.E.2d 175 (N.C. 1972) 4
Roche Prods., Inc. v. *Bolar Pharmaceutical Co.*, 733 F.2d 858 (Fed. Cir.), cert. denied, 469 U.S. 856 (1984) 5-6
Save Our Dunes v. *ADEM*, 834 F.2d 984 (11th Cir. 1987) 6

Statute:

Solid Waste Management Plan, Ala. Code § 22-27-40 *et seq.* 4

Miscellaneous:

C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* (2d ed. 1984) 5

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REPLY BRIEF FOR THE PETITIONER

Respondent Lauderdale County Commission does not take issue with any of the propositions set forth in our certiorari petition. It does not attempt to defend the Alabama Supreme Court's rationale for rejecting petitioner's procedural due process claim. It does not dispute that the Alabama Supreme Court's disposition of the due process claim conflicts with decisions of other federal courts of appeals and state supreme courts. Finally, respondent does not try to counter our showing that the questions presented in the petition involve issues of considerable importance.

Rather than defending the Alabama Supreme Court's decision on its own terms, the Commission advances a variety of other reasons why certiorari supposedly is inappropriate in this case. None of respondent's contentions provides the slightest justification for letting the decision below stand. Certio-

rari is clearly warranted to correct the Alabama Supreme Court's flawed due process analysis.

1. Respondent argues that the landfill license granted to petitioner Waste Contractors, Inc. (WCI), did not amount to a property interest protected by the Due Process Clause and that the revocation of that license accordingly did not implicate the due process guarantee. Both the Alabama Supreme Court and the Alabama Court of Civil Appeals rejected these very arguments, however, concluding that the revocation of the landfill license *did* violate petitioner's due process rights. See Pet. App. 8a-9a; 17a-18a.[1] Respondent's contentions are meritless.

First, respondent asserts (Br. in Opp. 9-13) that the landfill license was invalid because it was procured by fraud. These same allegations formed the basis of the State of Alabama's motion for summary judgment on grounds of unclean hands, laches and estoppel. See R. 187-206; 185-186. Following an argument before the trial court at which WCI opposed the State's motion, the motion was denied. Pet. App. 25a. Lauderdale County then advanced the same contention before the Alabama Court of Civil Appeals in support of its assertion that WCI had no constitutionally protected property interest in the landfill license. See Lauderdale County Ct. Civ. App. Br. 23-24. Although the appellate court did not specifically address the issue, it necessarily rejected the fraud claim because it found that WCI's due process rights had been violated and entered judgment in

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[1] Respondent presented these precise arguments in its briefs to these courts. See Lauderdale County Ct. Civ. App. Br. 23-26; Lauderdale County Br. in Support of Pet. for Cert. 25-29.

favor of WCI. Pet. App. 17a-18a. The Alabama Supreme Court agreed that petitioner had a protected property right. *Id.* at 8a-9a. In sum, the fraud argument (which raises only a question of state law) has been squarely rejected by the Alabama courts and therefore provides no basis for denying WCI's due process claim.[2]

Second, respondent contends (Br. in Opp. 13-17) that the landfill license is not a constitutionally protected property interest because WCI's investment in the landfill site was too small and WCI did not obtain a landfill permit from the Alabama Department of Environmental Management (ADEM). These assertions are legally irrelevant.

Contrary to respondent's apparent belief, WCI was not required to take any additional steps in order to "qualify" the landfill license for protection under the Due Process Clause. The Due Process Clause protected Waste Contractors' landfill license because the license itself was an interest as to which Waste Contractors had a "legitimate claim of entitlement." *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578

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[2] Respondent invokes *Codd* v. *Velger*, 429 U.S. 624 (1977), but in this case WCI responded to the fraud allegation *and* prevailed in the lower courts. WCI's full response to the fraud allegation appears in its brief in the Alabama Supreme Court (at 22-24). Basically, the different representations regarding the volume of waste to be disposed of in the landfill were made in response to entirely different inquiries. The smaller number—350 tons per day—is the level at which WCI anticipates operating the landfill. The larger number was provided in response to a request by the ADEM for the maximum daily disposal limit; it does not reflect the planned operational level. There was thus no fraud whatever in WCI's representations to the Lauderdale County Commission.

(1972); see also Pet. 7. This Court in *Bell* v. *Burson*, 402 U.S. 535 (1971), did not inquire whether Mr. Bell had purchased a car before concluding that his driver's license was property protected by the Due Process Clause. Here, the landfill license itself plainly amounted to a property interest protected by the Due Process Clause. Indeed, the Alabama courts recognized that fact by holding that the revocation of the license deprived WCI of its property in violation of the Due Process Clause.[3]

2. Next, respondent asserts (Br. in Opp. 18-24) that the enactment of the Solid Waste Management Plan, Ala. Code § 22-27-40 *et seq.*, moots this action because the statute imposes a moratorium on the issuance of new landfill licenses and prescribes criteria to govern permit proceedings upon the termination of the moratorium. The flaw in this argument is that Waste Contractors is not seeking a new license; it is seeking to invalidate the revocation of the license it was granted on April 14, 1987. Because the new

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[3] There is no rule requiring "substantial expenditures" (Br. in Opp. 13) in order to create a property right for purposes of the Due Process Clause. *Keiger* v. *Winston-Salem Board of Adjustment*, 190 S.E.2d 175 (N.C. 1972), holds merely that North Carolina law requires such expenditures to create a "vested right"; the case has nothing to do with Alabama law or procedural due process. *Four Seasons Apartment* v. *City of Mayfield Heights*, 775 F.2d 150 (6th Cir. 1985), rests not on the absence of substantial expenditures, but on the expiration of a building permit for lack of use. In any event, WCI clearly did make substantial expenditures in reliance on its landfill license. Cf. *Kasparek* v. *Johnson County Board of Health*, 288 N.W.2d 511, 518 (Iowa 1980) ($13,000 expenditure developing property gave owners a vested right to a sewer permit that could not be disturbed by subsequent regulation without compensation).

statute, which applies only to the issuance of new licenses, did not become effective until two years later—on May 16, 1989—that statute obviously could not affect the validity of the 1987 license.

Respondent may be arguing that the statute moots this action because WCI never obtained a permit from the ADEM and, under the new statutory scheme, the ADEM may issue a permit only if the applicant first obtains a local government license pursuant to the procedures set forth in the new statute. But if WCI's license had not been wrongfully revoked by respondent, WCI would have had two years in which to obtain a permit from the ADEM under the prior regulatory regime. We submit that the appropriate remedy for the due process violation is to put WCI in the position it would have been in had the constitutional violation not occurred—allow WCI to apply for a permit from the ADEM on the basis of its 1987 landfill license. Because the Alabama courts retain "the ability to undo the effects of [the challenged] conduct" (13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3533.3, at 278 (2d ed. 1984)) by ordering such relief, the action is not moot. See, *e.g.*, *Garcia* v. *Lawn*, 805 F.2d 1400, 1402-1404 (9th Cir. 1986) (appeal from denial of motion to preliminarily enjoin allegedly retaliatory transfer was not mooted by termination of employee for failure to accept transfer, because court had power to order employee reinstated at original post); *Roche Prods., Inc.* v. *Bolar Pharmaceutical Co.*, 733 F.2d 858, 865 (Fed. Cir.) (expiration of patent did not moot appeal from lower court's denial of injunctive relief, because court could fashion other relief—for example, confiscation and destruction of data generated by defendant through improper use of plaintiff's patented ingredient—to remedy the in-

fringement), cert. denied, 469 U.S. 856 (1984); *Herwald* v. *Schweiker*, 658 F.2d 359, 362 n.2 (5th Cir. Unit A 1981) (appeal from denial of motion to enjoin discharge of patient from health care facility was not mooted after discharge occurred, because court had power to order his return to the facility).

3. Finally, respondent asserts (Br. in Opp. 24-25) that WCI lacks standing to complain about the Alabama Supreme Court's determination that third parties to a land use decision have a property interest protected by the Due Process Clause. But that determination was the basis on which the Alabama court upheld the revocation of WCI's landfill license. For that reason, WCI plainly has standing to raise the issue.

Respondent insinuates that WCI is seeking to prevent citizens from expressing their views in connection with land use decisions. Nothing could be further from the truth. WCI welcomes community participation in landfill siting decisions pursuant to procedures established by state law. It does object to the misapplication of federal constitutional principles to justify the revocation of its landfill license in clear violation of the Due Process Clause.[4] The

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[4] Respondent's discussion (Br. in Opp. 26-27) of *Save Our Dunes* v. *ADEM*, 834 F.2d 984 (11th Cir. 1987), is inapposite because state-law procedural rights are irrelevant to the question whether an individual has a property right protected by the federal Due Process Clause. See Pet. 14 n.4. Respondent's attempt (Br. in Opp. 27-30) to rehabilitate the other Alabama Supreme Court decisions that contain the same error as the decision below cannot overcome the fact that those decisions indicate that due process is offended when the entire "affected citizenry" is not given prior notice of land use determinations. That was the basis for the Alabama Supreme Court's decision in the present case.

petition for a writ of certiorari should be granted to correct the Alabama Supreme Court's patently erroneous due process analysis.

Respectfully submitted.

ANDREW J. PINCUS *
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 778-0628

H. THOMAS WELLS, JR.
JAMES L. PRIESTER
Maynard, Cooper, Frierson & Gale, P.C.
1901 Sixth Avenue, North
2400 AmSouth/Harbert Plaza
Birmingham, AL 35203-2602
(205) 254-1000

* *Counsel of Record*

September 14, 1990